Supreme Court, U.S.
FILED

941238 JAN 17 1995

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIE LLOYD TURNER,
Petitioner,

v.

JOHN JABE, Warden,
Greenville Correctional Center,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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36pp

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QUESTIONS PRESENTED

I.

The Virginia capital murder statute, like that of many states, permits a jury to impose a death sentence if it finds "vileness" under any of three predicates—"torture, depravity of mind or aggravated battery to the victim." This Court has indicated that the language of this aggravating factor is unconstitutional on its face absent curative jury instructions and appellate review. The questions presented are:

A. Whether this unconstitutional vagueness is cured by Virginia's jury instruction defining "depravity of mind" as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation" or by Virginia's standards of appellate review, which have never resulted in a reversal of a death sentence on Eighth Amendment grounds.

B. Whether Virginia's jury instructions and standards for appellate review for the "depravity of mind" predicate assure differentiation among crimes eligible for the death penalty, thus satisfying the constitutional requirement that aggravating factors narrow the imposition of capital punishment.

II.

Whether Petitioner received effective assistance of counsel when his lawyer failed to produce any of the evidence promised in his opening statement at the sentencing hearing.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Virginia Capital Sentencing Scheme	3
B. Petitioner's Capital Sentence	6
C. Subsequent Proceedings	9
REASONS FOR GRANTING THE PETITION	10
I. THE COURTS OF APPEALS ARE IN CONFLICT ABOUT THE FURTHER LIMITATIONS CONSTITUTIONALLY REQUIRED TO PERMIT IMPOSITION OF THE DEATH PENALTY UNDER THE VILENESS AGGRAVATING FACTOR COMMON TO VIRGINIA AND MANY OTHER STATES	10
A. The Courts Of Appeals Have Adopted Inconsistent Standards By Which Jury Instructions Or Appellate Review Could Cure The Facially Unconstitutional Vagueness Of The Vileness Aggravating Factor	12
B. The Court Of Appeals Has Ignored This Court's Precedents Requiring Every Aggravating Factor To Narrow The Class Of Death-Eligible Crimes	19
II. THE COURT OF APPEALS' REJECTION OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM DEPARTS FROM THE PRECEDENTS IN THIS COURT AND OTHER COURTS OF APPEALS	23
CONCLUSION	28
APPENDIX	Separately Bound

TABLE OF AUTHORITIES

Cases Page

U.S. Supreme Court

Arave v. Creech, 113 S. Ct. 1534 (1993) 11, 19
Caldwell v. Mississippi, 472 U.S. 320 (1985) 6
Clemons v. Mississippi, 494 U.S. 738 (1990) 16
Godfrey v. Georgia, 446 U.S. 420 (1980) ..... *passim*
Gregg v. Georgia, 428 U.S. 153 (1976) 11, 13, 20
Jurek v. Texas, 428 U.S. 262 (1976) 11
Lewis v. Jeffries, 497 U.S. 764 (1989) 11
Maynard v. Cartwright, 486 U.S. 356 (1988) 12, 14
Murray v. Giarratano, 492 U.S. 1 (1989) 27
Shell v. Mississippi, 498 U.S. 1 (1990) 15
Strickland v. Washington, 466 U.S. 668 (1984) 23, 26
Teague v. Lane, 489 U.S. 288 (1989) 10
Tuilaepa v. California, 114 S. Ct. 2630 (1994) ..... *passim*
Turner v. Murray, 476 U.S. 28 (1986) 6
Walton v. Arizona, 497 U.S. 639 (1990) 13, 15
Zant v. Stephens, 462 U.S. 862 (1983) 11, 19

Other Federal Courts

Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988) 23
Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989), *vacated and remanded*, 500 U.S. 901 (1991), *on remand*, 946 F.2d 1443 (9th Cir. 1991), *vacated and remanded*, 113 S. Ct. 367 (1992), *on remand*, 16 F.3d 981 (9th Cir. 1994) .. 14, 15
Gaines v. Thieret, 665 F. Supp. 1342 (N.D. Ill. 1987), *rev'd on other grounds*, 846 F.2d 402 (7th Cir. 1988) 25
Harris v. Reed, 894 F.2d 871 (7th Cir. 1990) 24
Jones v. Murray, 947 F.2d 1106 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1591 (1992) 19, 22
Jones v. Murray, 976 F.2d 169 (4th Cir.), *cert. denied*, 113 S. Ct. 27 (1992) 19, 22
Mathenia v. Delo, 975 F.2d 444 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1609 (1993) 16
McAleese v. Mazurkiewicz, 1 F.3d 159 (3d Cir.), *cert. denied*, 114 S. Ct. 645 (1993) 24
Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990) 16

TABLE OF AUTHORITIES—Continued

	Page
Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987)	25
Turner v. Bass, 753 F.2d 342 (4th Cir. 1985)	7, 22
Turner v. Williams, 35 F.3d 872 (4th Cir. 1994)	*passim*
Turner v. Williams, 812 F. Supp. 1400 (E.D. Va. 1993)	1, 10
United States v. McGill, 11 F.3d 223 (1st Cir. 1993)	24
United States v. Washington, 840 F. Supp. 562 (N.D. Ill. 1993)	24
Wiley v. Puckett, 969 F.2d 86 (5th Cir. 1992)	17
Commonwealth of Virginia	
Barnes v. Commonwealth, 234 Va. 130, 360 S.E.2d 196 (1987), *cert. denied*, 484 U.S. 1036 (1988)	21
Boggs v. Commonwealth, 229 Va. 501, 331 S.E.2d 407 (1985), *cert. denied*, 475 U.S. 1031 (1986)	18
Bunch v. Commonwealth, 225 Va. 423, 304 S.E.2d 271, *cert. denied*, 464 U.S. 977 (1983)	15, 21
Davidson v. Commonwealth, 244 Va. 129, 419 S.E.2d 656, *cert. denied*, 113 S. Ct. 423 (1992)	17
Delong v. Commonwealth, 234 Va. 357, 362 S.E.2d 669 (1987), *cert. denied*, 485 U.S. 929 (1988)	25
Edmonds v. Commonwealth, 229 Va. 303, 329 S.E.2d 807, *cert. denied*, 474 U.S. 975 (1985)	22
Frye v. Commonwealth, 231 Va. 370, 345 S.E.2d 267 (1986)	5, 6
Hoke v. Commonwealth, 237 Va. 303, 377 S.E.2d 595, *cert. denied*, 491 U.S. 910 (1989)	17
Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984), *cert. denied*, 472 U.S. 1012 (1985)	18
Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992), *cert. denied*, 113 S. Ct. 1880 (1993)	17, 18
Mu'Min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990), *aff'd*, 500 U.S. 415 (1991)	22
Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979)	4, 5, 15
Stewart v. Commonwealth, 245 Va. 222, 427 S.E.2d 394, *cert. denied*, 114 S. Ct. 143 (1993)	17
Stout v. Commonwealth, 237 Va. 126, 376 S.E.2d 288, *cert. denied*, 492 U.S. 925 (1989)	22

TABLE OF AUTHORITIES—Continued

Page

Thomas v. Commonwealth, 244 Va. 1, 419 S.E.2d 606, *cert. denied*, 113 S. Ct. 421 (1992) 17
Tuggle v. Commonwealth, 228 Va. 493, 323 S.E.2d 539 (1984), *rev'd*, 471 U.S. 1096 (1985) 15
Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981) 3, 7, 18, 21
Turner v. Commonwealth, 234 Va. 543, 364 S.E.2d 483, *cert. denied*, 486 U.S. 1017 (1988) 9, 17, 18
Turner v. Williams, No. 901335 (Southampton County Cir. Ct. May 23, 1990) 9
Turner v. Williams, No. 901335 (Va. Apr. 30, 1991) 9
Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985), *cert. denied*, 475 U.S. 1099 (1986).. 21

Other State Courts

Butler v. State, 789 S.W.2d 898 (Tenn. 1990)..... 24
Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976)..
Jackson v. State, No. 79509, 1994 WL 137914 (Fla. Apr. 21, 1994) 21
People v. Ortiz, 224 Ill. App.3d 1065, 586 N.E.2d 1384, *appeal denied*, 145 Ill.2d 641, 596 N.E.2d 635 (1992) 24
People v. Schlager, 247 Ill. App.3d 921, 617 N.E.2d 1275, *appeal denied*, 152 Ill.2d 575, 622 N.E.2d 1223 (1993) 24

Constitutional and Statutory Provisions

Sixth, Eighth and Fourteenth Amendments to the United States Constitution ..... *passim*
28 U.S.C. § 1254(1) (1988) 2
28 U.S.C. § 2254 (1988) 10
Del. Code Ann. tit. 11, § 4209(e)(I)(l) (1993).... 12
Ga. Code Ann. § 17-10-30(b)(7) (Michie(1994).... 12
Mo. Rev. Stat. § 565.032(2)(7) (Vernon 1994 Supp.) 12
Nev. Rev. Stat. § 200.033(8) (1992) 12
N.J. Rev. Stat. § 2C:11-3(c)(4)(c) (1994 Supp.).. 12

TABLE OF AUTHORITIES—Continued

Page

S.D. Codified Laws Ann. § 23A-27A-1(6) (1994 Supp.) 12
Va. Code Ann. § 18.2-31 (Michie 1994 Supp.) 2, 3, 20
Va. Code Ann. § 19.2-264.4 (Michie 1994 Supp.) 2, 4, 12, 20

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PETITION FOR A WRIT OF CERTIORARI

Willie Lloyd Turner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming denial of his petition for a writ of habeas corpus in this death penalty case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-99a) is officially reported at 35 F.3d 872 (4th Cir. 1994). The opinion of the District Court (App. 100a-164a) is officially reported at 812 F. Supp. 1400 (E.D. Va. 1993).

JURISDICTION

The Court of Appeals entered judgment affirming the denial of a writ of habeas corpus on September 15, 1994, and the parties' petitions for rehearing were denied on

October 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition invokes the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and involves Sections 18.2-31 and 19.2-264.4 of the Virginia Code. These provisions are reprinted in Appendix E at 175a-178a.

STATEMENT OF THE CASE

1. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court held that a vileness aggravating factor identical to the one at issue here was unconstitutionally vague and overbroad on its face, but indicated that narrowing jury instructions and careful appellate review could save the provision. *Tuilaepa v. California*, 114 S. Ct. 2630 (1994), suggests that any curative jury instructions must both provide a common-sense core of meaning for the vague terms used and narrow the field of potential capital cases. Petitioner's case tests the minimum requirements necessary for a commonly used vileness aggravating factor and squarely presents the provision's constitutional infirmities. Certiorari review is warranted because, for several reasons, there may be no better case in which to resolve the issues raised. First, the jury did not find any other aggravating factor. Second, the jury did not indicate which predicate of vileness supported its finding; thus, if any predicate is unconstitutional, the death sentence cannot stand. Third, the court below ruled that Petitioner's claims are neither *Teague*-barred nor procedurally defaulted. Finally, the fact-pattern presented here—a shooting during a robbery—plainly does not lie at the core of the vileness aggravating factor. The jury was instructed, however, that "depravity of mind," defined as "moral turpitude and psychical debasement," could justify a finding of "vileness," which was the basis

for the death sentence here. There is, therefore, a grave risk that the sentence was based on an unconstitutional understanding of vileness.

The decision below that the jury instructions given in this case were sufficient to uphold Petitioner's death sentence conflicts with a Ninth Circuit case rejecting more specific instructions. The alternative holding that state appellate review also provided an adequate cure conflicts with a decision of the Eighth Circuit because the Virginia Supreme Court does not require consistency among sentences for death-eligible crimes and has never overturned a capital sentence on Eighth Amendment grounds, either on direct or collateral appeal, since the death penalty was reinstated in 1977. In addition, the decision below ignores this Court's requirement that any aggravating factor must limit death-eligibility meaningfully, and the Fourth Circuit has demonstrated that it intends to do nothing more unless directed by this Court to do so. Furthermore, the Virginia Supreme Court has gone so far as to reject *Godfrey* altogether as resting on its unique facts. *Turner v. Commonwealth*, 221 Va. 513, 525, 273 S.E.2d 36, 44 (1980), *cert. denied*, 451 U.S. 1011 (1981). This Court has never considered Virginia's capital sentencing scheme, though Virginia trails only Texas and Florida in the number of prisoners executed since 1977.

2. The rejection of Petitioner's claim regarding denial of effective assistance of counsel is inconsistent with the criteria established by this Court. It also departs from the precedents of other courts of appeals.

A. The Virginia Capital Sentencing Scheme

To convict a defendant of capital murder in Virginia, a jury must find that the defendant committed a "willful, deliberate, and premeditated killing" that meets one of several enumerated descriptions. Va. Code Ann. § 18.2-31 (Michie 1994 Supp.). After conviction, the jury must find the presence of at least one of two aggravating factors

to recommend a death sentence: (1) that "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society" (the "future dangerousness" aggravating factor), or (2) that the defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim" (the "vileness" aggravating factor). Va. Code Ann. § 19.2-264.4(C) (Michie 1994 Supp.). This statutory language is used to instruct juries during sentencing. If the jury finds one or both aggravating factors are present, it must then make a discretionary determination whether to impose the death penalty in light of any mitigating evidence presented to it. *Smith v. Commonwealth*, 219 Va. 455, 479-80, 248 S.E.2d 135, 150 (1978), *cert. denied*, 441 U.S. 967 (1979).[1]

In Petitioner's case, the jury based its recommendation of a death sentence solely on the vileness aggravating factor. When instructing juries on that aggravating factor, sentencing courts in Virginia, although not required to do so by the Virginia Supreme Court, often offer additional standard jury instructions which further define "depravity of mind" as a "degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Smith*, 219 Va. at 478, 248 S.E.2d at 149.[2] The standard jury instructions also define "ordinary legal malice" as follows:

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[1] If the jury convicts but does not unanimously find the presence of at least one aggravating factor, the sentencing court must impose a sentence of life imprisonment. Va. Code Ann. § 19.2-264.4(E) (Michie 1994 Supp.). The Virginia statutory scheme requires the jury to use a verdict form that indicates the sentence and, if the sentence is death, which aggravating factor or factors were proven. Va. Code Ann. 19.2-264.4(D) (Michie 1994 Supp.)

[2] This petition focuses on the "depravity of mind" predicate for vileness. This case presented no evidence of "torture" and the

> Maliciously means intentionally doing a wrongful act to another without legal excuse or justification. Malice implies that the mind of the actor is under the control of reason. It excludes heat of passion. Malice and heat of passion cannot coexist. Malice includes not only anger, hatred or revenge, but every unlawful or unjustifiable motive. Malice can be inferred from any willful, deliberate, and cruel act against another.

The standard jury instructions also state that "[w]illful, deliberate, and premeditated means the adoption of a specific intent to kill. The intent to kill must come into existence at some time before the killing, but need not exist for any particular length of time."

Armed only with these instructions, a Virginia jury is charged to determine whether the crime in question involved depravity of mind, thus permitting a death sentence under the vileness aggravating factor. If the jury recommends a death sentence, the sentencing court is bound to follow the recommendation unless either facts presented in the assigned probation officer's report indicate that the death sentence is inappropriate or unjust or the defendant can show good cause to set the recommendation aside. *See Frye v. Commonwealth*, 231 Va. 370, 397, 345 S.E.2d 267, 286 (1986).

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instructions given here did not put that predicate before the jury. As for "aggravated battery," the instructions defined it as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith*, 219 Va. at 479-80, 248 S.E.2d at 150. By contrast, this Court has indicated that, for capital sentencing under an identical vileness aggravating factor in Georgia, the standard for aggravated battery requires "evidence of serious physical abuse of the victim before death." *Godfrey v. Georgia*, 446 U.S. 420, 431 (1980). In any event, the jury here did not specify which predicate supported its finding of vileness. Therefore, if any predicate falls short of the constitutional standards established by this Court, the sentence cannot stand.

The Virginia Supreme Court has considered ninety-seven capital cases since 1978.[3] It has never commuted or reversed and remanded a death sentence on Eighth Amendment grounds since the death penalty was reinstated in Virginia in 1977.[4]

B. Petitioner's Capital Sentence

On July 12, 1978, Petitioner shot the owner of a jewelry store during a robbery after the store owner triggered a silent alarm. The store owner was shot three times, one bullet grazing his scalp and two bullets hitting his chest in rapid succession. The second and third shots were each independently fatal. Petitioner was convicted of capital murder in December 1979 and sentenced to death in February 1980. Following federal post-conviction appeals, this Court affirmed the conviction but vacated the death sentence because the trial court had refused to question prospective jurors about possible bias resulting from the fact that Petitioner is African-American and his victim was white. *Turner v. Murray*, 476 U.S. 28 (1986). The proceedings culminating in *Turner v. Murray* are referred to as "*Turner I*". The subsequent resentencing proceedings are referred to as "*Turner II*".

The case returned to the Circuit Court for the County of Southampton, which appointed J. Lloyd Snook, III and Thomas L. Woodward, Jr. as Petitioner's counsel for the resentencing hearing. Snook, who served as lead counsel, had never represented a client in a capital trial, al-

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[3] A table of citations for cases reviewed by the Virginia Supreme Court is included as Appendix D at 166a-174a to this petition. The table also indicates the aggravating factor or factors found by the jury.

[4] The only possible exception is the reversal in *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267 (1986). That case cited *Caldwell v. Mississippi*, 472 U.S. 320 (1985), where this Court held that prosecutorial statements diminishing the jury's sense of responsibility for imposition of a death sentence violated the Eighth Amendment. *Frye* does not rely upon the Eighth Amendment directly.

though he had considerable appellate experience in death penalty cases. Woodward, by all accounts, played a minor role in the resentencing.[5]

In *Turner I*, the jury had found both statutory aggravating factors (future dangerousness and vileness) after little more than an hour of deliberation. Although the Virginia Supreme Court concluded that Petitioner's crime did "not rise to the level" of "atrociousness" exhibited in other cases, *Turner v. Commonwealth*, 221 Va. 513, 530, 273 S.E.2d 36, 47 (1980), it nonetheless upheld the jury's finding and sustained the death sentence. In the post-conviction challenges to the conviction and sentence, each reviewing court upheld the findings of both vileness and future dangerousness. *See, e.g., Turner v. Bass*, 753 F.2d 342, 350-53 (4th Cir. 1985).

Under the terms of this Court's remand order, the Commonwealth had six months to resentence Petitioner. Thus, defense counsel knew in July 1986 that the trial would take place in January 1987. The prosecutor promised to present the same case as was offered in *Turner I*. He also promised to introduce evidence of Petitioner's involvement in a breakout incident at Mecklenburg prison in 1984. Defense counsel, however, did virtually nothing to develop a mitigation case during the next several months. He conceded that he did not even begin to focus seriously on the trial until nine days before it was to commence.[6]

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[5] Both attorneys were involved in *Turner I*. Woodward served as co-counsel at trial, while Snook represented Petitioner in post-conviction proceedings.

[6] Defense counsel never conducted a comprehensive interview with Petitioner. He did not meet *any* potential mitigation witnesses until the morning they arrived to testify, and he failed to interview the prosecution's witnesses. Furthermore, he did not subpoena any mitigation witnesses to testify on Petitioner's behalf. His supervision of the court-appointed mental health expert, Dr. Fisher, was so inadequate that Dr. Fisher, the primary witness for the defense, did not examine Petitioner until after the prosecution had rested.

Counsel was aware of but failed to investigate the 1984 prison breakout, and thus did not develop evidence that Petitioner had prevented both murder and rape during the incident. According to one sworn statement, Petitioner told other inmates who had seized guards as hostages and were threatening to kill them: "No, you're not. You're going to have to go thru [sic] me first. If you're going to kill somebody, you will have to kill me first." *Turner v. Williams*, 35 F.3d 872, 902 (4th Cir. 1994). One of the officers whose life had been threatened corroborated this statement. In addition, two corrections officers indicated that Petitioner played a key role in securing the hostages' safety and release. Another officer gave a sworn statement that Petitioner had talked an inmate out of killing all the guards taken hostage and had aided in their release. Still another reported that Petitioner had convinced other inmates not to rape a nurse who had been taken hostage. All of these witnesses could have testified at the resentencing, but defense counsel never contacted any of them.[7]

During *voir dire*, defense counsel voluntarily informed prospective jurors that another Virginia jury had previously sentenced Petitioner to death for the murder at issue in the resentencing.[8] Then, during the opening statement for the defense at the resentencing, he promised to put on mitigating evidence. He rested, however, without presenting any mitigating evidence at all—an omission that the prosecution repeatedly emphasized during closing argument.

The resentencing jury was given the standard instructions set out above. Defense counsel objected to the vile-

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[7] Petitioner was not charged with any crime or institutional infraction in connection with the breakout incident.

[8] One juror indicated that he would probably be affected by his knowledge of the earlier sentence, but he was nonetheless allowed to sit on the jury based on the strength of the prosecution's argument that the influence of the earlier death sentence would be no greater on that juror than on the others.

ness instruction, arguing that because all first-degree murders are vile, horrible and inhuman, the vileness factor did not provide sufficient guidance to minimize the likelihood that the death penalty would be imposed arbitrarily. Furthermore, defense counsel argued that shooting a single victim three times during a bungled robbery did not qualify for vileness. Nevertheless, the court instructed the jury on the vileness aggravating factor using the standard language quoted above.

After deliberating for a time, the jury returned with three questions. The first was whether the original trial transcript was available; the Court replied that it was not. Then the jury asked about the possibility of parole if it found for life imprisonment. Over the objection of defense counsel, the Court replied that the jury "need not concern [itself] with what may happen afterwards." The jury deliberated further, and then returned to ask whether the verdict had to be unanimous for either the death penalty or life imprisonment. The Court answered that the verdict should be unanimous in either case. The jury then returned a verdict fixing the sentence at death based solely on the vileness factor.

C. Subsequent Proceedings

The Virginia Supreme Court upheld the sentence. *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483 (*Turner II*), *cert. denied*, 486 U.S. 1017 (1988). Petitioner then sought state habeas relief, alleging both the unconstitutionality of the vileness aggravating factor and the denial of effective assistance of counsel, among other claims. The same judge who sentenced Petitioner then held a hearing on some of the ineffective assistance claims and denied them, adopting verbatim the Commonwealth's proposed findings of fact; all other claims were dismissed without a hearing. *Turner v. Williams*, No. 901335 (Southampton County Cir. Ct. May 23, 1990). The Virginia Supreme Court denied the petition for appeal. *Turner v. Williams*, No. 901335 (Va. Apr. 30, 1991).

Pursuant to 28 U.S.C. § 2254 (1988), Petitioner sought federal habeas relief. The district court denied Petitioner's motion for discovery and production of documents and his motion for an evidentiary hearing. Instead, the court entered summary judgment in favor of respondent and dismissed the petition. *Turner v. Williams,* 812 F. Supp. 1400 (E.D. Va. 1993). After rejecting the Commonwealth's arguments that Petitioner's claims were barred by *Teague v. Lane,* 489 U.S. 288 (1989), and procedurally defaulted, the U.S. Court of Appeals for the Fourth Circuit affirmed the denial of the writ of habeas corpus, addressing Petitioner's claims on the unconstitutionality of the Virginia sentencing scheme and his claims of ineffective assistance of counsel on the merits. *Turner v. Williams,* 35 F.3d 872 (4th Cir. 1994).

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE IN CONFLICT ABOUT THE FURTHER LIMITATIONS CONSTITUTIONALLY REQUIRED TO PERMIT IMPOSITION OF THE DEATH PENALTY UNDER THE VILENESS AGGRAVATING FACTOR COMMON TO VIRGINIA AND MANY OTHER STATES.

Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980), held that a vileness aggravating factor identical to that at issue here was unconstitutionally vague and overbroad on its face absent clarifying and narrowing jury instructions and appellate review to restrict imposition of the death penalty to crimes lying at the core of the vileness factor. Since *Godfrey,* the lower courts have been divided as to whether jury instructions like those used in Virginia give juries adequate guidance to minimize their ability to impose the death penalty arbitrarily. Furthermore, it is unclear whether appellate review is adequate to save a sentencing scheme where, as here, a State's courts never commute or reverse a capital sentence on Eighth Amendment grounds and make no effort to reconcile death sen-

tences with *lesser* sentences given for similar crimes in other cases. This petition affords this Court the opportunity to resolve conflict and confusion on the requirements necessary to bring the vileness aggravating factor within constitutional bounds.

In general, statutory aggravating factors must meet two constitutional standards to justify a death sentence. They "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey v. Georgia,* 446 U.S. at 428 (footnotes omitted).[9] Additionally, aggravating factors must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens,* 462 U.S. 862, 877 (1983). Last term, this Court incorporated these standards into a two-prong test. *Tuilaepa v. California,* 114 S. Ct. 2630 (1994). First, "the aggravating circumstance may not be unconstitutionally vague"—that is, it must have a " 'common-sense core of meaning . . . that criminal juries should be capable of understanding.' " 114 S. Ct. at 2635-36 (citing *Godfrey,* 446 U.S. at 428, and *Arave v. Creech,* 113 S. Ct. 1534, 1541 (1993), and quoting *Jurek v. Texas,* 428 U.S. 262, 279 (1976) (White, J., concurring)). Second, "the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." 114 S. Ct. at 2635 (citing *Arave,* 113 S. Ct. at 1542). *Accord Gregg v. Georgia,* 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or

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[9] On several subsequent occasions, a majority of the Court has adopted this standard. *See, e.g., Lewis v. Jeffries,* 497 U.S. 764, 777-78 (1989); *Arave v. Creech,* 113 S. Ct. 1534, 1540 (1993).

spared, that discretion must be suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action."); *Godfrey,* 446 U.S. at 427 ("[A] capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not.") (internal quotes and citations omitted); *Maynard v. Cartwright,* 486 U.S. 356, 362 (1988) ("[O]ur cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

The Virginia statute allows for imposition of the death penalty if the jury finds that the defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code Ann. § 19.2-264.4(C) (Michie 1994 Supp.). It is identical to provisions in six other States. Del. Code Ann. tit. 11, § 4209(e)(I)(l) (1993); Ga. Code Ann. § 17-10-30(b)(7) (Michie 1994); Mo. Ann. Stat. § 565.032 (2)(7) (Vernon 1994 Supp.); Nev. Rev. Stat. § 200.033 (8) (1992); N.J. Rev. Stat § 2C:11-3(c)(4)(c) (1994 Supp.); S.D. Codified Laws Ann. § 23A-27A-1(6) (1994 Supp.). The first issue presented in this petition is whether the vileness provision as applied below—and generally in Virginia—survives this Court's two-prong test.

A. The Courts Of Appeals Have Adopted Inconsistent Standards By Which Jury Instructions Or Appellate Review Could Cure The Facially Unconstitutional Vagueness Of The Vileness Aggravating Factor.

This Court has addressed this vileness aggravating factor twice, determining that the language is unconstitutionally vague on its face, but leaving open the standards

for jury instructions and appellate review necessary to cure that deficiency. In *Gregg v. Georgia,* 428 U.S. 153, 201 & n.51 (1976), this Court indicated that this factor is subject to challenge for both vagueness and overbreadth and that reviewing courts should consider whether its imprecise language introduces arbitrariness and caprice into the imposition of capital punishment. The Court went on, however, to state that these defects could be cured by appropriate jury instructions and direct appellate review. *Id. Godfrey v. Georgia,* 446 U.S. 420 (1980), specifically held that a provision identical to that under which Petitioner was sentenced was vague on its face. The plurality opinion stated:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. . . . [The trial judge's failure to provide clarifying jury instructions] gave the jury no guidance concerning the meaning of any of [the statute's] terms. In fact, the jury's interpretation of [the provision] can only be the subject of sheer speculation.

446 U.S. at 428-29. The *Godfrey* opinion went on to consider whether there was sufficient independent appellate review of the record to cure the deficiency in that case and held that there was not. *Id.,* 446 U.S. at 429-433.[10]

In addition to the court below, two U.S. courts of appeals have considered what is necessary to cure the defects of such a vileness provision. The Ninth Circuit has held that jury instructions more specific and narrowing than those used here do not provide sufficient guidance. The Eighth Circuit has held that appellate review which does not impose a limiting construction is insuffi-

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[10] Because the Virginia vileness aggravating factor is identical to the Georgia provision at issue in *Gregg* and *Godfrey,* "there is no serious argument" that the factor is constitutional without appropriately narrowing jury instructions and limiting direct appellate review. *Walton v. Arizona,* 497 U.S. 639, 654 (1990).

cient to save the statute. In contrast, the court below upheld the Virginia capital sentencing scheme on the basis of vague and unconstraining jury instructions and a history of nominal appellate review in which no death sentence has been overturned on Eighth Amendment grounds.

The vileness aggravating factor is especially vague in that it includes "depravity of mind" as a basis for imposition of capital punishment.[11] The Ninth Circuit has held that detailed jury instructions did not cure the vagueness of identical language in Nevada's capital sentencing statute. The rejected charge in that case read:

> [T]he condition of the mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

Deutscher v. Whitley, 884 F.2d 1152, 1162 n.1 (9th Cir. 1989) ("*Deutscher I*"), *vacated and remanded*, 500 U.S. 901 (1991), *on remand*, 946 F.2d 1443, 1446-47 (9th Cir. 1991) ("*Deutscher II*"), *vacated and remanded*, 113 S. Ct. 367 (1992), *on remand*, 16 F.3d 981 (9th Cir. 1994). The Ninth Circuit held that this instruction did not meet the requirements of *Godfrey* because it failed to "restrain[] arbitrary imposition of the death penalty." The court elaborated: "The depravity instruction in this case, although it contains more words, is no more capable of channeling discretion than the 'especially heinous, atrocious, or cruel' instruction rejected in *Maynard* [*v. Cartwright*, 486 U.S. 356 (1988)] or the 'outrageously or wantonly vile, horrible or inhuman' instruction in *Godfrey*." *Deutscher I*, 884 F.2d at 1162.[12]

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[11] See note 2, *supra*.

[12] After this Court remanded *Deutscher* after vacating on other grounds, the court of appeals again rejected the depravity of mind

When given,[13] the standard Virginia jury instructions define "depravity of mind" as a "degree of moral turpitude and and [sic] psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Turner v. Williams*, 35 F.3d 872, 891 (4th Cir. 1994). Even with further definitions of "malice" and "premeditation," these instructions do not meet this Court's requirement that aggravating factors have a *common-sense* core of meaning that criminal juries should be capable of understanding. *Tuilaepa*, 114 S. Ct. at 2635-36. "Moral turpitude" at best is only an alternative formulation of "baseness," "depravity," or "vileness," words that this Court has rejected as a constitutional basis for imposing the death penalty. *See Godfrey*, 446 U.S. at 428-29.[14] "Psychical debasement" has no apparent meaning at all and could refer to corruption from supernatural, spiritual, mental, moral, emotional, intuitive or any of several other influences. All in all, the jury

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element and the Nevada jury instructions, reiterating the same reasoning from the first opinion in virtually the identical words. *See Deutscher II*, 946 F.2d at 1447. In affirming the prior ruling, the court added that the instruction also "failed to include objective indicia analogous to the instructions approved in *Walton v. Arizona*." *Id.*

[13] In direct contradiction of this Court's holding in *Godfrey*, the Virginia Supreme Court has held that no clarifying jury instructions are required for vileness at all because the predicates are all commonly understood to have the meanings ascribed to them in the jury instructions given here. *See Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984), *rev'd*, 471 U.S. 1096 (1985); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271, *cert. denied*, 464 U.S. 977 (1983); *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979).

[14] *See also Shell v. Mississippi*, 498 U.S. 1, 2 (1990) (holding unconstitutional an instruction providing "the word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of[,] the suffering of others").

instructions used in Virginia fall considerably short of the instructions found unconstitutional in *Deutscher*.[15]

The alternative holding below—that Virginia's system of appellate review cures the deficiencies in the jury instructions—conflicts with decisions of the Eighth Circuit addressing Missouri's system of appellate review of an identical vileness provision. The Eighth Circuit found that the Missouri Supreme Court failed to cure the defect on direct review, even though it claimed to apply standards narrowing the factor to cases involving physical and psychological torture over a substantial period of time, brutality, mutilation of the body, absence of motive or absence of remorse. *Newlon v. Armontrout*, 885 F.2d 1328, 1334 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990). *See also Mathenia v. Delo*, 975 F.2d 444, 449 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1609 (1993).

Moreover, this Court has clearly stated that appellate review must do more than simply apply a limiting construction to the provision and determine whether the evidence could support a vileness finding; the courts must inquire into "whether *beyond reasonable doubt* the result would have been the same had the [vileness] aggravating circumstance been properly defined in the jury instructions." *Clemons v. Mississippi*, 494 U.S. 738, 754

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[15] Furthermore, a standard which requires "moral turpitude" and "psychical debasement" *surpassing* ordinary malice and premeditation is meaningless because, as defined in the Virginia jury instructions used here, ordinary malice can be inferred from *any* willful, deliberate and cruel act against another. Asking a jury whether a murder defendant's moral turpitude or psychical debasement surpassed this standard—any deliberate act—does not provide the "specific guidance" necessary in a capital sentencing context. Similarly, as defined in the Virginia jury instructions used here, premeditation requires the formation of intent before action, but that intent need not exist for any particular length of time. If the formation of an intent to kill one second before acting meets the standard of premeditation, formation of an intent to kill one hour, or one minute or even two seconds before acting "surpasses" that standard.

(1990) (emphasis added). This requirement imposes a burden which is plainly "more exacting than the burden of finding that the evidence supports the narrowed aggravating factor." *Wiley v. Puckett*, 969 F.2d 86, 93 (5th Cir. 1992). Yet in this case all the Virginia Supreme Court *purported* to do was determine whether the evidence could have supported a finding of vileness. 364 S.E.2d at 489.

Indeed, rather than using appellate review to define the vileness factor more concretely and thus limit the arbitrary nature of the imposition of the death penalty in Virginia, the vagueness of the provision and its instructions has enabled the Virginia Supreme Court to reject every Eighth Amendment challenge it has faced in a capital case. In so doing, the Virginia Supreme Court has held the following:

- That any predicate (including depravity of mind) on its own can suffice for the imposition of a death sentence, *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (1992), *cert. denied*, 113 S. Ct. 1880 (1993);

- That depravity of mind can exist even if the record does not support any finding of torture or aggravated battery, *Stewart v. Commonwealth*, 245 Va. 222, 427 S.E.2d 394, *cert. denied*, 114 S. Ct. 143 (1993);

- That failure to accept responsibility for the crime can support a finding of vileness, *Davidson v. Commonwealth*, 244 Va. 129, 419 S.E.2d 656, *cert. denied*, 113 S. Ct. 423 (1992);

- That lack of remorse can constitute depravity of mind, *Thomas v. Commonwealth*, 244 Va. 1, 419 S.E.2d 606, *cert. denied*, 113 S. Ct. 421 (1992);

- That depravity of mind can be inferred from premeditation, *Hoke v. Commonwealth*, 237 Va. 303, 377 S.E.2d 595, *cert. denied*, 491 U.S. 910 (1989);

• That vileness can be inferred from the "nature" of the murder as well as the number of batteries, *Boggs v. Commonwealth*, 229 Va. 501, 331 S.E.2d 407 (1985), *cert. denied*, 475 U.S. 1031 (1986); and

• That the "vile" conduct can occur after the death of the victim, even if death is instantaneous, *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (1992), *cert. denied*, 113 S. Ct. 1880 (1993); *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984), *cert. denied*, 472 U.S. 1012 (1985).

Petitioner's case is an extreme example of the loose standards in the Virginia Supreme Court's appellate review. When that court first considered the facts in *Turner I*, it found that the crime did not reach the level of atrociousness found in many other capital cases, 273 S.E.2d at 47, but upheld the death sentence because "[e]ven if Turner's crime did not meet the 'vileness" standard, imposition of the death penalty would be permissible under the 'dangerousness' standard." 273 S.E.2d at 45. After the *Turner II* jury rejected future dangerousness as an aggravating factor, the Virginia Supreme Court, revisiting the same facts it addressed in *Turner I*, held that "[w]e think that the evidence of Turner's conduct in killing his victim" meets the depravity of mind standard "clearly and completely." 364 S.E.2d at 489. The vagueness of the depravity of mind predicate, its malleability to adjust to any set of circumstances, and the Virginia Supreme Court's inability to set limits on its adaptability together can yield any result—even different results on the same facts before the same court.

Because several states have aggravating factors containing a depravity of mind predicate, because the Fourth Circuit is in conflict with both this Court and with other circuits regarding the standards that jury instructions and appellate review must meet to comply with constitutional requirements, and because the Fourth Circuit has indi-

cated that it has no intention of reconsidering the issue,[16] this Court should provide guidance as to the clarifying jury instructions and depth of appellate review necessary for constitutional application of the vileness aggravating factor.

B. The Court Of Appeals Has Ignored This Court's Precedents Requiring Every Aggravating Factor To Narrow The Class Of Death-Eligible Crimes.

Even if an aggravating factor is clear, specific and objective, it must still narrow the class of death-eligible defendants. "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Arave*, 113 S. Ct. at 1542, *quoted with approval in Tuilaepa*, 114 S. Ct. at 2635. To meet the demands of the Eighth Amendment, an aggravating factor "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The Virginia jury instructions for vileness through the depravity of mind predicate, however, authorize a death sentence for virtually *every* murder defendant.

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[16] The Fourth Circuit has repeatedly upheld the Virginia sentencing scheme. The opinion below simply declares with no analysis that "we have on several occasions upheld [these] limiting definitions . . . [and] we believe [they] are sufficiently clear and objective." *See Turner v. Williams*, 35 F.3d 872, 892 (4th Cir. 1994). No common-sense meaning of the instructions is offered. In *Jones v. Murray*, 976 F.2d 169, 174-75 (4th Cir.), *cert. denied*, 113 S. Ct. 27 (1992), the prior opinion cited as precedent on this issue, the court merely stated in a conclusory fashion that the instructions provided adequate guidance to the jury. Its predecessor, *Jones v. Murray*, 947 F.2d 1106, 1118-19 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1591 (1992), rejected the argument that these limiting instructions are utterly unintelligible to the average juror, but the opinion offered no elucidation of the common-sense meaning of the instructions.

This Court's first opinion on the vileness factor at issue here noted that: "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed this way, and there is no reason to assume that the [State] Supreme Court . . . will adopt such an open-ended construction." *Gregg v. Georgia*, 428 U.S. 153, 201 (1976). In *Godfrey v. Georgia*, this Court had to revisit this vileness aggravating factor because the Georgia courts continued to affirm death sentences based on nothing more than findings that the offenses were "outrageously or wantonly vile, horrible or inhuman." 446 U.S. 420, 428 (1980). The Court reiterated the concern that a "person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and [sic] inhuman.'" 446 U.S. at 428-29. In holding that the Georgia vileness provision as applied was unconstitutional, this Court made clear that the vileness factor cannot simply be a catch-all and that state standards must restrict imposition of capital punishment for vileness to those cases that lie at the core of its meaning. *See Godfrey*, 446 U.S. at 429-30.

The standard Virginia jury instructions given at Petitioner's resentencing require nothing more than "moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation," which in turn are defined, respectively, as "every unlawful or unjustified motive" and the presence of "a specific intent to kill" which "need not exist for any particular length of time." *Every* murder defendant eligible for the death penalty in Virginia, however, has committed a crime that is, by definition, willful, deliberate and premeditated. Va. Code Ann. §§ 18.2-31, 19.2-264.4 (Michie 1994 Supp.). *Every* death-eligible murder is a crime surpassing other willful, deliberate and cruel acts against another. If possession of intent to kill for even a moment suffices to meet the standard of premeditation, *every* capital murder surpasses that standard; capital mur-

der, by definition, excludes manslaughter and crimes of passion. *Every* capital murder involves serious moral turpitude and debasement in its lack of respect for human life and thus is inherently depraved. Accordingly, Virginia's instructions are not "limiting" or "narrowing" at all; instead, they permit a jury to recommend a capital sentence for any death-eligible defendant. In light of *Tuilaepa* and the standards elucidated in *Arave* and *Zant*, they are unconstitutional.[17]

Nor is there anything in Virginia's standards of appellate review that restricts approval of death sentences to "those cases that lie at the core" of the vileness provision. *Godfrey*, 446 U.S. at 429. The Virginia Supreme Court has repeatedly held that use of more than one bullet in a shooting alone is enough to support a finding of vileness. *See, e.g., Watkins v. Commonwealth*, 229 Va. 469, 489, 331 S.E.2d 422, 437 (1985), *cert. denied*, 475 U.S. 1099 (1986) (citing *Turner I*, 221 Va. at 518, 527, 273 S.E.2d at 39, 45). Furthermore, multiple shots are enough to impose a death sentence under the aggravated battery predicate of the vileness factor even if no single wound would have killed the victim and the combined shots were the minimum necessary to accomplish the act of murder. *Barnes v. Commonwealth*, 234 Va. 130, 139, 360 S.E.2d 196, 202-03 (1987), *cert. denied*, 484 U.S. 1036 (1988). In fact, *even a single gunshot wound* alone is enough for Virginia to uphold a finding of vileness for depravity of mind where the crime is premeditated and the defendant displays a lack of remorse. *See Bunch v. Commonwealth*, 225 Va. 423, 443-44, 304 S.E.2d 271, 282-83, *cert. denied*, 464 U.S. 977 (1983). The Virginia Supreme Court has also repeatedly held that a single stab wound is enough to support a finding of vileness under the aggravated battery predicate of the vileness factor.

[17] In a recent opinion, the Florida Supreme Court rejected an aggravating factor for crimes which are "cold, calculated and premeditated" as unconstitutionally vague and overbroad. *Jackson v. State*, No. 79509, 1994 WL 137914 (Fla. Apr. 21, 1994).

See Mu'Min v. Commonwealth, 239 Va. 433, 450, 389 S.E.2d 886, 897 (1990), *aff'd*, 500 U.S. 415 (1991); *Stout v. Commonwealth*, 237 Va. 126, 132, 376 S.E.2d 288, 291, *cert. denied*, 492 U.S. 925 (1989); *Edmonds v. Commonwealth*, 229 Va. 303, 312, 329 S.E.2d 807, 814, *cert. denied*, 474 U.S. 975 (1985). Thus, Virginia's review of the aggravating factor is so lenient as to accommodate *every* death-eligible crime.

Although the Fourth Circuit has characterized Virginia's depravity of mind jury instructions as "limiting," no panel has ever provided a reasoned opinion explaining *how* the jury instructions narrow the class of death-eligible defendants. *See Turner v. Williams*, 35 F.3d 872, 892 (4th Cir. 1994) (following *Jones v. Murray*, 976 F.2d 169, 174-75 (4th Cir.), *cert. denied*, 113 S. Ct. 27 (1992)); *Jones*, 976 F.2d at 174-75 (stating without elaboration that the "instructions clearly direct the jury away from that result by requiring that something extra be present," *i.e.*, moral turpitude and psychical debasement surpassing malice and premeditation); *Jones v. Murray*, 947 F.2d 1106, 1119 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1591 (1992) (citing *Turner v. Bass*, 753 F.2d 342, 351 (4th Cir. 1985)); *Turner*, 753 F.2d at 351 ("[T]he Virginia Court has also given a limiting construction to two components of the vileness criterion. Depravity of mind has been construed to mean 'a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.' " (citation omitted)).

Because the court below has repeatedly endorsed decisions of the Virginia Supreme Court which conflict with applicable decisions of this Court, the Court should grant certiorari on the issue of failure to narrow as well as vagueness.

II. THE COURT OF APPEALS' REJECTION OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM DEPARTS FROM THE PRECEDENTS IN THIS COURT AND OTHER COURTS OF APPEALS.

The Sixth Amendment's guarantee of the right to assistance of counsel mandates that such assistance be effective. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).[18] In *Strickland*, this Court elucidated a three-part test to determine if counsel's performance fails to meet this standard: (1) counsel's representation must fall below an objective standard of reasonableness, 466 U.S. at 687; *and* (2) the deficient performance must prejudice the defense, 466 U.S. at 687; *but* (3) counsel's strategic choices are entitled to deference if "made after thorough investigation of law and facts relevant to plausible options," 466 U.S. at 690. Some conduct by counsel is so unreasonable, so prejudicial and so unlikely to constitute trial strategy that it constitutes ineffective assistance of counsel as a matter of law.

Several lower court decisions have ruled that failure to put on evidence promised in an opening statement by itself constitutes ineffective assistance of counsel. *Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir. 1988), held that the failure to put on expert witnesses promised in defense counsel's opening statement was "prejudicial as a matter of law." When faced with a fact pattern nearly identical to the one presented in this petition, the Seventh Circuit held as follows:

> [C]ounsel decided not to present these available witnesses; he chose to gamble on his perceptions about the weakness of the prosecution's case. By resting without presenting any of the evidence in favor of the defense, counsel left the jury free to believe [the prosecution's] account of the incidents as the only

[18] The guarantee of effective assistance of counsel extends to capital sentencing proceedings. *Strickland*, 466 U.S. at 684-87.

made during the pretrial period and his notes during the resentencing hearing itself indicate that he knew his preparation was woefully inadequate. He failed to subpoena or even interview a single mitigation witness.[23] Counsel must have known that his failure to prepare would all but preclude presentation of the evidence he was promising to the jury in his opening statement. Yet he promised testimony, knowing the results in *Turner I*, knowing that the jury was aware of the prior verdict, knowing the prosecution's case, knowing that he was not prepared to make good on his promises, knowing his

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evidence." *Turner v. Williams*, 35 F.3d 872, 895 (4th Cir. 1994). Indeed, to the extent the court of appeals attributed counsel's failure to put on evidence to "strategic choices" (35 F.3d at 903, 904), it is important to bear in mind that *Strickland* allows for deference to counsel's decisions only if they are based on a "thorough investigation of law and facts relevant to plausible options." 466 U.S. at 690. The failure to make thorough investigation is permissible only to the extent that "reasonable professional judgments support the limitations on investigation." 466 U.S. at 691.

That counsel's failures were a result of poor preparation and were not attributable to fear of rebuttal is evident from his failure to introduce the evidence of Petitioner's role in saving hostages from murder and rape even when there was a risk-free opportunity to do so during cross-examination. When Commonwealth witness J.E. Mills, who read the statements favored by the prosecution, finished testifying, the prosecutor asked him whether he had reviewed every statement relating to the incident. After he answered in the affirmative, giving defense counsel a perfect opportunity to cross-examine on Petitioner's role, counsel did nothing.

[23] With regard to Dr. Fisher, the expert witness appointed to testify on Petitioner's behalf, the court below declared: "In the instant case, Snook intended at outset to present the evidence described in opening statement" (*Turner v. Williams*, 35 F.3d 872, 904 (4th Cir. 1994)) and that "[o]ne direct meeting [between Dr. Fisher and] Mr. Turner was all that [was] necessary" (35 F.3d at 898). *Yet Dr. Fisher had not met Petitioner when counsel made his promises during the opening statement.* Even by this absurdly low standard, counsel was not prepared to present the evidence when he promised it to the jury.

client's life was at stake. And then he rested without putting on any case whatsoever.

When considering Virginia's system of representation in capital cases, Chief Justice Rehnquist observed that:

> Virginia may quite sensibly decide to concentrate the resources it devotes to providing attorneys for capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack.

Murray v. Giarratano, 492 U.S. 1, 11 (1989). Unfortunately, that admonition came too late for Petitioner. He did not receive effective assistance of counsel during his resentencing hearing, and the Constitution requires that his death sentence be vacated and that the case be returned for a fair resentencing.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: January 17, 1995

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Supreme Court, U.S.
FILED

No. 941238 JAN 17 1995

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Supreme Court of the United States

OCTOBER TERM, 1994

WILLIE LLOYD TURNER,
Petitioner,

v.

JOHN JABE, Warden,
Greenville Correctional Center,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF CONTENTS

		Page
APPENDIX A	Opinion of United States Court of Appeals for the Fourth Circuit (Sept. 15, 1994)	1a
APPENDIX B	Memorandum Opinion of United States District Court for the Eastern District of Virginia (Feb. 1, 1993)	100a
APPENDIX C	Order of United States Court of Appeals for the Fourth Circuit (Oct. 17, 1994)	165a
APPENDIX D	Commonwealth of Virginia Death Penalty Cases	166a
APPENDIX E	Relevant Constitutional and Statutory Provisions	175a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 93-4001

WILLIE LLOYD TURNER,
Petitioner-Appellant,

v.

DAVID A. WILLIAMS, Warden,
Powhatan Correctional Center,
Respondent-Appellee.

Argued Dec. 8, 1993

Decided Sept. 15, 1994

Before HALL, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed by published opinion. Judge MICHAEL wrote the opinion, in which Judge K.K. HALL joined. Judge LUTTIG wrote a separate opinion, concurring in the judgment.

OPINION

MICHAEL, Circuit Judge:

Petitioner Willie Lloyd Turner is a Virginia prisoner who was convicted of murder and first sentenced to death in 1979. In 1986, after state and federal collateral review, the United States Supreme Court vacated his sen-

tence and remanded for resentencing. In 1987, a Virginia jury again sentenced him to death. In 1992, after unsuccessful direct and collateral review in the Virginia courts, Turner petitioned the United States District Court for the Eastern District of Virginia for relief pursuant to 28 U.S.C. § 2254. The district court denied that relief. *Turner v. Williams*, 812 F.Supp. 1400 (E.D. Va.1993). Turner appeals, arguing that the district court erred in dismissing (1) his claims attacking the application of a statutory aggravating factor that permits imposition of death upon a finding that the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman," and (2) his several ineffective assistance of counsel claims. For the reasons that follow, we affirm.

I

On the morning of July 12, 1978, Turner entered Smith Jewelers, owned and operated by W. Jack Smith, Jr. in City of Franklin, Virginia. Turner went in the store with a sawed-off shotgun wrapped in a towel. Without saying a word, Turner displayed his shotgun and motioned to Smith. Smith immediately began stuffing money into a jewelry bag. While he was filling the bag, Smith inconspicuously activated the store's silent alarm to the police department. Meanwhile, Turner directed the several customers and employees present to line up behind the store counter, kicking a customer in the process.

Shortly after Smith triggered the alarm, a police officer, Alan D. Bain, Jr. arrived at the store and told Smith that his alarm was activated. Turner pointed his shotgun at Officer Bain's head and ordered him to remove his revolver from its holster and put it on the floor. Turner then grabbed Officer Bain's revolver off the floor, jabbed his shotgun at the officer, and directed him to the back of the store with the others.

Turner, now brandishing his shotgun in one hand and Bain's revolver in the other, fired the revolver into the

back wall of the store. He threatened to "start killing" if another police officer showed up. At this point, without any provocation, Turner pointed the revolver at Smith and fired. The bullet struck Smith in the head. Smith yelled, slumped over the counter and fell to the floor, unconscious, gurgling, and bleeding from the head. The shot caused bleeding and bruising on Smith's brain surface, but was not fatal.

At this point, Officer Bain began talking to Turner. He offered to take Turner out of the store if he would agree not to shoot anyone else. While Bain talked to Turner, two customers were able to escape from the store. Turner then said, "I'm going to kill this nigger squealer," JA 314, referring to Smith, who was not African American. Turner then immediately reached over the counter with the revolver and fired two close-range shots into the left side of Smith's chest. The shots caused Smith's body to jump. (One of the bullets penetrated his heart, food and wind pipes before ultimately lodging in his spine; the other bullet passed through his lung and out his back. Medical testimony established that either of the two shots to the chest would have been fatal.) Immediately after these shots, Officer Bain was able to shove Turner and grab his weapons. Bain then forced Turner to get down on the floor and called for help.

On December 4, 1979, Turner was convicted for murdering Smith, and on December 6, 1979, a jury in Northampton County recommended that he be sentenced to death. On direct appeal, the Supreme Court of Virginia affirmed the conviction and sentence, and the United States Supreme Court denied certiorari. *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied sub nom. Turner v. Virginia*, 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981). Turner then filed a petition for a writ of habeas corpus in the circuit court of Southampton County, Virginia. That petition was denied, and the Supreme Court of Virginia affirmed. The

United States Supreme Court again denied his certiorari petition. *Turner v. Virginia*, 462 U.S. 1112 (1983).

Turner next sought relief in the federal courts. On July 27, 1983, he filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. The petition was denied, and our court affirmed. *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985). Turner then filed another certiorari petition in the United States Supreme Court, which was granted. On April 30, 1986, the Supreme Court vacated Turner's death sentence (but not his conviction) because the trial court had refused to question prospective jurors about possible bias resulting from the fact that Turner was African American and his victim was white. *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). The Supreme Court remanded the case, which ultimately went to the circuit court of Southampton County for a new sentencing hearing.[1]

Turner was represented at resentencing by court-appointed lawyers, J. Lloyd Snook, III and Thomas L. Woodward, Jr. The resentencing hearing (a jury proceeding) occurred on January 7-9 and 12, 1987. The Commonwealth finished its case on Friday, January 9, and the defense rested on Monday, January 12, without putting on any mitigating evidence. The jury was then instructed. Under Virginia's death penalty scheme, the jury may fix the sentence at death if it finds either one of two aggravating factors: (1) "that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (the "future dangerousness" factor), or (2) "that his conduct in committing the offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery

[1] We will refer to the original (1979) sentencing proceeding and related collateral proceedings as *"Turner I"* and to the resentencing proceeding and related collateral proceedings as *"Turner II."*

to the victim" (the "vileness" factor). Va.Code Ann. § 19.2-264.2 (Michie 1990).[2] Turner's jury was given limiting instructions that defined the "aggravated battery" and "depravity of mind" components of the vileness factor.

On January 12, 1987, Turner's resentencing jury returned a verdict fixing his sentence at death based solely on the vileness factor.[3] His sentence was upheld on direct appeal to the Supreme Court of Virginia, and the United States Supreme Court denied his certiorari petition. *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483, *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988).

Turner then filed a petition for a writ of habeas corpus in the circuit court of Southampton County, alleging ineffective assistance of counsel and other claims. On September 11-13, 1989, the state court held an evidentiary hearing on some of his ineffective assistance claims; all other claims were dismissed without an evidentiary hearing. On May 23, 1990, the court issued a letter order that adopted the Commonwealth's proposed findings of

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[2] In full, Virginia's death penalty statute provides:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

[3] Although the trial court instructed the jury on the "future dangerousness" factor, the jury did not find that factor established. In *Turner I*, however, the jury found both the vileness factor and the future dangerousness factor.

fact and rejected Turner's ineffective assistance claims. On July 5, 1990, the court issued a formal order incorporating the letter order and dismissing Turner's habeas petition. On April 30, 1991, the Supreme Court of Virginia dismissed Turner's habeas appeal. *Turner v. Williams,* No. 901335 (Va. Apr. 30, 1991). That court rejected his ineffective assistance claims on the merits and concluded that his other claims were procedurally defaulted.

Turner next sought collateral review in the federal courts. On December 10, 1991, he filed a 28 U.S.C. § 2254 petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. The Commonwealth moved for dismissal under Rule 12(b)(6) or, in the alternative, for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. On February 1, 1993, the district court granted the Commonwealth's motion for summary judgment and dismissed his petition. *Turner v. Williams,* 812 F.Supp. 1400 (E.D.Va.1993). The court found that most of Turner's claims were procedurally barred and rejected the others on the merits. Turner now appeals to this court.

Turner's claims on this appeal can be grouped in two general categories. First, he raises several challenges to the application of the vileness factor. Second, he says his lawyers rendered ineffective assistance in several respects.[4] The Commonwealth responds that all of Turner's claims are barred under *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion), because they would require us to announce new constitutional rules of criminal procedure on collateral review. The Commonwealth next asserts that Turner's challenges to the application of the vileness factor, as well as one of his ineffective assistance claims, are procedurally

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[4] Turner does not appeal the numerous other claims dismissed by the district court below.

barred. We must first address these arguments to determine whether we can even reach the merits of Turner's claims.

II

In *Teague v. Lane*, a plurality of the Supreme Court adopted the second Justice Harlan's retroactivity approach and held that a "new rule" of federal constitutional law will not be applied or announced on collateral review unless the rule falls within one of two narrow exceptions.[5] *See generally Teague*, 489 U.S. at 299-316, 109 S.Ct. at 1068-78 (plurality opinion). Shortly thereafter, *Teague*'s retroactivity approach was adopted by a majority of the Court and held to apply to capital cases. *See Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The new rule principle is predicated on interests in comity and in the finality of criminal convictions. *Gilmore v. Taylor*, —— U.S. ——, ——, 113 S.Ct. 2112, 2116, 124 L.Ed.2d 306 (1993).

> The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered. This is but a recognition that the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine.

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[5] The first exception is for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe." *Teague*, 489 U.S. at 311, 109 S.Ct. at 1075 (plurality opinion) (internal quotation marks omitted). The second exception is for " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 1264, 108 L.Ed.2d 415 (1990). Because we ultimately conclude that Turner's claims are not barred by *Teague*, we need not discuss whether his claims can fit within either narrow exception.

Sawyer v. Smith, 497 U.S. 227, 234, 110 S.Ct. 2822, 2827, 111 L.Ed.2d 193 (1990).

Generally, there are two types of *Teague* cases. In the first type, the petitioner seeks to rely on a decision announced after his conviction became final. In the second type, the petitioner relies on a decision announced before his conviction became final. In the latter, "it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent." *Stringer v. Black*, —— U.S. ——, ——, 112 S.Ct.1130, 1135, 117 L.Ed.2d 367 (1992); *see also Nickerson v. Lee*, 971 F.2d 1125, 1132 n. 12 (4th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1289, 122 L.Ed.2d 681 (1993).

The policy behind the new rule principle is desirable; but applying that principle leaves something to be desired, for "[i]t is admittedly often difficult to determine when a case announces a new rule. . . ." *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 (plurality opinion). In *Teague*, the plurality said:

> In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. *Id.* (citations omitted); *see also Penry*, 489 U.S. at 314, 109 S.Ct. at 1077; *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260, 108 L.Ed.2d 415 (1990); *Butler v. McKellar*, 494 U.S. 407, 412, 110 S.Ct. 1212, 1216, 108 L.Ed.2d 347 (1990); *Sawyer*, 497 U.S. at 234, 110 S.Ct. at 2827; *Stringer*, —— U.S. at ——, 112 S.Ct. at 1135; *Graham v. Collins*, —— U.S. ——, ——, 113 S.Ct. 892, 897, 122 L.Ed.2d 260 (1993); *Gilmore*, —— U.S. at ——, 113 S.Ct. at 2116; *Caspari v. Bohlen*, —— U.S. ——, ——,

114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994). Subsequent cases have added more words (if not guidance) to the new rule inquiry. *See, e.g., Butler*, 494 U.S. at 415, 110 S.Ct. at 1217 (a case announces a new rule when the rule "was susceptible to debate among reasonable minds"); *Parks*, 494 U.S. at 488, 110 S.Ct. at 1260 (a case does not announce a new rule if "a state court considering [petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution"); *Sawyer*, 497 U.S. at 234, 110 S.Ct. at 2827 (a "gradual development[ ] in the law over which reasonable jurists may disagree" is a new rule); *Graham*, —— U.S. at ——, 113 S.Ct. at 898 (a case announces a new rule "unless reasonable jurists hearing petitioner's claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor"). In its most recent new rule case, the Court set forth the following three-pronged approach:

> In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must [s]urve[y] the legal landscape as it then existed, and determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution. Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Bohlen, —— U.S. at ——, 114 S.Ct. at 953 (internal quotation marks and citations omitted). Guided by

Teague and the cases it has spawned, we will proceed through the *Bohlen* formula.

Turner's conviction and sentence became final in 1988, when the United States Supreme Court denied his petition for certiorari in *Turner II*. We must therefore determine whether a state court considering Turner's claims in 1988 would have felt compelled to conclude that the rules he seeks were required by the Constitution. To do this, we address the Commonwealth's *Teague* challenges in turn, and we ultimately conclude that Turner does not seek new rules.

A. *The Applicability of* Teague v. Lane *to Turner's Claim that the Commonwealth Applied the Vileness Factor in an Unconstitutional Manner*

Turner contends that Virginia's facially vague vileness factor was not constitutionally applied in his case. Specifically, he says that the limiting definitions of "depravity of mind" and "aggravated battery" given to his jury were inadequate because they did not sufficiently cure the vague language of the vileness factor.[6] Further, he says the Supreme Court of Virginia, which applied the same limiting construction, did not cure that infirmity with an adequate review of his sentence. He thus seeks the benefit of a rule that a vague aggravating factor must be supplemented with constitutionally sufficient limiting instructions or appellate review.

Turner bases his claim on Justice Stewart's plurality opinion in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), decided eight years before

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[6] The resentencing court instructed the jury that "an aggravated battery is a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder." JA 517-P. The court further instructed that "depravity of mind is a degree of moral turpitude and and [sic] psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." JA 517-Q.

his conviction became final. In *Godfrey*, the Supreme Court vacated a death sentence that was based on an aggravating factor virtually identical to Virginia's vileness factor.[7] Godfrey's jury was instructed only with the bare language of the aggravating factor; the jury did not receive any limiting instructions. *Id.* at 426, 100 S.Ct. at 1763-64 (plurality opinion). Moreover, on direct review the Georgia Supreme Court, in conclusory fashion, held that the evidence supported a finding of vileness; the court did not provide any limiting construction to narrow the statutory language. *Id.* at 427, 432, 100 S.Ct. at 1764, 1766-67 (plurality opinion).

Justice Stewart's plurality opinion began by noting that the language of the vileness factor was vague: There was nothing in the words " 'outrageously or wantonly vile, horrible, and inhuman' . . . standing alone, that implie[d] any inherent restraint" on the jury's discretion to impose the death penalty. *Id.* at 428, 100 S.Ct. at 1764-65 (plurality opinion). The plurality observed that the Georgia courts did not cure that vagueness through adequate jury instructions or meaningful appellate review. *Id.* at 429, 432, 100 S.Ct. at 1765, 1766-67 (plurality opinion). In vacating Godfrey's sentence, the plurality emphasized a central tenet of the Court's Eighth Amendment jurisprudence: The state "must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Id.* at 428, 100 S.Ct. at 1764-65 (plurality opinion) (footnotes and internal quotation marks omitted).

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[7] The Georgia factor permitted the imposition of death if it was found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.* 446 U.S. at 422, 100 S.Ct. at 1762 (plurality opinion) (quoting Ga.Code § 27-2534.1(b)(7) (1978)). *Compare supra* note 2 (Virginia statute).

We read *Godfrey* to say that the Eighth Amendment proscribes the imposition of a death sentence based on a vague aggravating factor unless the vague factor has been narrowed by a constitutionally sufficient limiting construction, either at sentencing (in the form of a limiting instruction when a jury is involved) or on appellate review. Not just any limiting construction will do; a *constitutionally sufficient* one is required. *See id.* at 433, 100 S.Ct. at 1767 (plurality opinion) ("Thus, the validity of the petitioner's death sentences turns on whether . . . the Georgia Supreme Court can be said to have applied a *constitutional construction* of the [vileness factor].") (emphasis added); *Jones v. Murray*, 976 F.2d 169, 174 (4th Cir.) ("[W]hen limiting instructions are used to cure a defect in a facially vague statute, the instructions must meet the specificity requirements of *Godfrey*."), *cert. denied*, —— U.S. ——, 113 S.Ct. 27, 120 L.Ed.2d 951 (1992); *Turner*, 753 F.2d at 353 (noting that the "constitutional flaw of *Godfrey*" was "the Georgia Court's failure to give a *constitutional construction* to the vileness criterion") (emphasis added). A limiting construction that is itself too vague leaves a defendant in no better position than the petitioner in *Godfrey*—sentenced on the basis of " 'standards so vague that they would fail adequately to channel the sentencing decision . . . .' " *Godfrey*, 446 U.S. at 428, 100 S.Ct. at 1765 (plurality opinion) (quoting *Gregg v. Georgia*, 428 U.S. 153, 195 n. 46, 96 S.Ct. 2909, 2935 n. 46, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). "Vague terms do not suddenly become clear when they are defined by reference to other vague terms." *Cartwright v. Maynard*, 822 F.2d 1477, 1489 (10th Cir. 1987) (en banc), *aff'd*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).[8]

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[8] *See Shell v. Mississippi*, 494 U.S. 1, 3, 111 S.Ct. 313, 314, 112 L.Ed.2d 1 (1990) (Marshall, J., concurring) ("Obviously, a limiting instruction can be used to give content to a statutory factor that 'is itself too vague to provide any guidance to the sentencer'

Godfrey thus dictates Turner's challenge to the constitutional sufficiency of the limiting instructions given to his jury as well as the appellate review of his sentence. Indeed, the Supreme Court, in *Stringer v. Black, supra,* has recently held that the application of *Godfrey* did not amount to a new rule for purposes of *Teague. Stringer* addressed, *inter alia,* whether *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), announced a new rule under *Teague. Cartwright* involved an Oklahoma death sentence predicated on two aggravating factors, one of which permitted the imposition of a death sentence if the defendant's murder was "especially heinous, atrocious, or cruel" (the "heinousness" factor). *Cartwright,* 822 F.2d at 1478. Cartwright's sentencing jury was given a limiting instruction beyond the bare terms of the heinousness factor. *Id.* at 1488. On direct review, the Oklahoma Court of Criminal Appeals affirmed after applying a limiting construction to the facts of Cartwright's case, focusing on the "manner" in which the murder was committed. *See Cartwright v. Oklahoma,* 695 P.2d 548, 554 (Okla.Crim.App.1985). That court previously had approved jury instructions similar to those given to Cartwright's jury. *Cartwright,* 822 F.2d at 1487-88.

In his habeas petition, Cartwright alleged that the Oklahoma courts applied the heinousness factor in an unconstitutionally vague and overbroad manner in his case.

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only if the limiting instruction's own 'definitions are constitutionally sufficient,' that is, only if the limiting instruction itself 'provide[s] *some* guidance to the sentencer.'" (quoting *Walton v. Arizona,* 497 U.S. 639, 654, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990))); *Deutscher v. Whitley,* 884 F.2d 1152, 1162 (9th Cir.1989) ("The depravity of mind instruction . . . fails to meet *Godfrey* requirements. . . . The depravity instruction in this case, although it contains more words, is no more capable of channeling discretion than the . . . instruction rejected in [*Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)] or the . . . instruction in *Godfrey.*"), *vacated on other grounds,* 500 U.S. 901, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1991).

Id. at 1478. Specifically, Cartwright claimed: (1) the language of the heinousness factor was vague, and (2) the Oklahoma courts failed to apply a constitutionally sufficient limiting construction (through jury instructions or on direct review of his sentence) to cure the vagueness. *Id.* The Tenth Circuit, sitting en banc, agreed. *See id.* at 1479 ("the Oklahoma courts failed to apply a constitutionally adequate narrowing construction in this case"), 1491, 1492. The Tenth Circuit's decision was predicated on *Godfrey*. *See id.* at 1489, 1491. The Supreme Court affirmed the Tenth Circuit. The Court noted the Tenth Circuit's conclusion that the Oklahoma courts had not "adopted a limiting construction that cured the infirmity" of the vague heinousness factor. *Cartwright,* 486 U.S. at 360, 108 S.Ct. at 1857. Significantly, the Court thought the Tenth Circuit "was quite right in holding that *Godfrey* controls this case." *Id.* at 363, 108 S.Ct. at 1858-59.

Then, four years after it decided *Cartwright*, the Court decided *Stringer v. Black*. In *Stringer,* the habeas petitioner attempted to rely on *Cartwright* to challenge the constitutionality of his death sentence. *Stringer,* ——— U.S. at ———, 112 S.Ct. at 1133. The State of Mississippi invoked *Teague,* arguing that the petitioner could not rely on *Cartwright* because that decision was announced after his conviction became final. *Id.* The Court thus had to decide whether *Cartwright* announced a new rule, *i.e.*, whether Cartwright's challenge was dictated by *Godfrey*. *Id.* The Court held: "In applying *Godfrey* to the language before us in [*Cartwright*], we did not 'brea[k] new ground.' [*Cartwright*] was, therefore, for purposes of *Teague*, controlled by *Godfrey*, and it did not announce a new rule." *Id.* at ———-———, 112 S.Ct. at 1135-36 (quoting *Butler*, 494 U.S. at 412, 110 S.Ct. at 1216).

Stringer thus teaches that *Teague* does not bar a habeas petitioner's invocation of *Godfrey* to challenge the constitutional sufficiency of limiting instructions or appellate

review if a state uses a vague aggravating factor. *See Wiley v. Puckett*, 969 F.2d 86, 97 (5th Cir.1992); *cf. Newlon v. Armontrout*, 885 F.2d 1328, 1331-35 (8th Cir.1989), *cert. denied sub nom. Delo v. Newlon*, 497 U.S. 1038, 110 S.Ct. 3301, 111 L.Ed.2d 810 (1990); *Smith v. Dixon*, 766 F.Supp. 1370, 1383-86 (E.D.N.C. 1991), *aff'd*, 996 F.2d 667 (4th Cir. 1993), *rev'd on other grounds*, 14 F.3d 956 (4th Cir.1994) (en banc), *petition for cert. filed*, (U.S. May 27, 1994) (No. 93-9353); *Jones v. Murray*, 976 F.2d 169, 173 (4th Cir.) (both parties agreed that the application of *Godfrey* was not barred by *Teague* and therefore we did not have to reach the *Teague* issue; nevertheless, we indicated that challenges to Virginia's limiting instructions and appellate review were not barred by *Teague*), *cert. denied*, —— U.S. ——, 113 S.Ct. 27, 120 L.Ed.2d 951 (1992).

The similarities between *Cartwright* and the instant case are striking. Like Cartwright, Turner was sentenced on the basis of a vague statutory aggravating factor. Like Cartwright, Turner's jury was given a limiting instruction and a limiting construction was applied on appellate review. Like Cartwright, Turner argues that the Commonwealth's limiting construction was constitutionally insufficient; *i.e.*, it did not cure the infirmity of the aggravating factor and thereby failed to guide adequately the jury's discretion. And, like Cartwright, Turner's challenge is predicated on *Godfrey*. Because *Stringer* expressly held that *Godfrey* dictated Cartwright's claim and thus Cartwright did not seek the benefit of a new rule for purposes of *Teague*, we are compelled to reach the same conclusion here.

In sum, we are satisfied that a state court in 1988 would have felt compelled to conclude that *Godfrey* and *Cartwright* dictate the rule or result Turner seeks. (Although *Cartwright* came down shortly after Turner's conviction became final, Turner may use that decision be-

cause *Cartwright* did not announce a new rule. *See generally Stringer, supra.*)[9]

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[9] Several Supreme Court decisions announced after Turner's conviction became final seemingly take for granted that challenges to a state's limiting construction are predicated on *Godfrey* and *Cartwright*. For example, in *Shell, supra*, a nonhabeas case, the Court, in a *per curiam* opinion, reversed the petitioner's sentence, saying: "Although the trial court in this case used a limiting instruction to define the [heinousness] factor, that instruction is not constitutionally sufficient." 498 U.S. at 1, 111 S.Ct. at 313 (citing *Godfrey* and *Cartwright*). Similarly, *Walton v. Arizona, supra*, a nonhabeas case, involved a *Godfrey/Cartwright* challenge to Arizona's limiting construction of its heinousness factor. The Supreme Court said:

> When a federal court is asked to review a state court's application of an individual statutory aggravating . . . circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. *If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, i.e.,* whether they provide *some* guidance to the sentencer.

Walton, 497 U.S. at 654, 110 S.Ct. at 3057-58 (first emphasis added). In *Lewis v. Jeffers*, 497 U.S. 764, 774, 110 S.Ct. 3092, 3098-99, 111 L.Ed.2d 606 (1990), the habeas petitioner likewise argued that Arizona's construction of its heinousness factor contravened *Godfrey* and *Cartwright*. The Court said:

> We have reiterated the general principle that aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not.
>
> Indeed, in [*Cartwright*] we applied the teachings of *Godfrey* to hold that the Oklahoma courts *had not construed Oklahoma's [heinousness factor] in a manner sufficient "to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment."*

Id. at 776, 110 S.Ct. at 3100 (quoting *Cartwright*, 486 U.S. at 364, 108 S.Ct. at 1859) (emphasis added) (citations omitted); *see also Arave v. Creech*, —— U.S. ——, ——-——, 113 S.Ct. 1534, 1540-41, 123 L.Ed.2d 188 (1993).

The Commonwealth nevertheless emphasizes that before Turner's conviction became final in 1988, our court, in *Turner v. Bass*, *supra*, upheld a limiting construction of the vileness factor that was virtually identical to the limiting instruction given to Turner's jury and applied on direct review of his sentence. Thus, the argument follows, a Virginia court in 1988 would not have felt compelled to declare unconstitutional the specific limiting construction used in his case. *Cf. Graham*, —— U.S. at ——, 113 S.Ct. at 903. And, relatedly, the argument goes, a decision in Turner's favor would require the creation of a new rule insofar as it would repudiate *Turner v. Bass*. *See id.* at ——, 113 S.Ct. at 897.

Before we address this argument, we note that Turner challenges the limiting definitions of two components of the vileness factor, "aggravated battery" and "depravity of mind" limiting definition. *See Turner*, 753 F.2d at (virtually identical) limiting definition of "aggravated battery"; we did not address the sufficiency of the "depravity of mind" limiting definition. *See Turner*, 753 F.2d at 353. Thus, were we to accept the Commonwealth's *Teague* theory here, at most we would be barred from reviewing the sufficiency of the aggravated battery definition.

Turning then to the limiting definition of aggravated battery applied in *Turner II*, the Commonwealth, on the face of it, appears to have a good argument that Turner seeks a new rule vis-a-vis *Turner v. Bass*. However, the answer is not so simple. The Commonwealth's theory focuses on *the most specific conclusion or holding* Turner hopes we reach: that the limiting definition used in his case was constitutionally insufficient. But we cannot ignore the fact that the principle of law (the "constitutional rule[ ] of criminal procedure," *Teague*, 489 U.S. at 316, 109 S.Ct. at 1078 (plurality opinion)) from which Turner seeks to benefit is the extant rule propounded in *Godfrey* and reaffirmed in *Cartwright*. *Cf. Bohlen*, ——

U.S. at ——, 114 S.Ct. at 955 (in its new rule analysis, the Court focused on the more general rule sought—that the Double Jeopardy Clause applies to a noncapital sentencing proceeding—as opposed to the specific holding sought by the petitioner, that his sentence violated the Double Jeopardy Clause). Here, we are asked simply to apply, rather than extend, the *Godfrey/Cartwright* principle. *Cf. Stringer*, —— U.S. at ——, 112 S.Ct. at 1135. Although "it can be a difficult question whether a particular holding presents simply a new setting for an old rule, or announces a new one," *Graham*, —— U.S. at ——, 113 S.Ct. at 918 (Souter, J., dissenting), we think the former best characterizes Turner's claim.

Penry v. Lynaugh makes the point. In *Penry*, the petitioner (Penry) claimed he "was sentenced to death in violation of the Eighth Amendment because the jury was not instructed that it could consider and give effect to his mitigating evidence in imposing its sentence." *Penry*, 492 U.S. at 307, 109 S.Ct. at 2941. On collateral review, the Fifth Circuit had rejected Penry's claim because his jury was allowed to hear all mitigating evidence (mental limitations and abused childhood). *See Penry v. Lynaugh*, 832 F.2d 915, 920 (5th Cir.1987), *aff'd*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.E.2d 256 (1989). The court nevertheless was concerned that, under the Texas scheme, Penry's jury was not able to consider and give effect to his mitigating evidence. *See generally id.* at 920-26. The Fifth Circuit concluded that it could not rule in Penry's favor "because *prior Fifth Circuit decisions have rejected claims similar to Penry's. These prior panel holdings bar a different holding by us.*" *Id.* at 926 (emphasis added) (citations omitted). Thus, granting Penry the relief he sought would have required the Fifth Circuit to overrule its precedents. The Supreme Court granted certiorari.

The Supreme Court first addressed whether Penry's claim was barred under *Teague*. *See generally Penry*, 492 U.S. at 313-19, 109 S.Ct. at 2943-47. One would think

this was an easy case; granting Penry the relief he sought seemingly would have required the creation of a new rule insofar as it would have repudiated prior Fifth Circuit decisions. And, with those Fifth Circuit cases in the legal landscape, presumably a state court at the time his conviction became final would not have felt compelled to grant Penry the relief he sought. But the Supreme Court held that Penry's claim was not *Teague*-barred: He did not seek a new rule because he simply sought the application (not the extension) of a preexisting rule of law in a new factual setting. *See id.* at 314-15, 318-19, 109 S.Ct. at 2944-45, 2946-47.

> [T]he facial validity of the Texas death penalty statute had been upheld in [*Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)] on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present. Penry argues that those assurances were not fulfilled *in his particular case* because, without appropriate instructions, the jury could not fully consider and give effect to the mitigating evidence of his mental retardation and abused childhood in rendering its sentencing decision. . . . [I]n light of the assurances upon which *Jurek* was based, we conclude that the relief Penry seeks does not "impos[e] a new obligation" on the States of Texas.

Id. 492 U.S. at 318-19, 109 S.Ct. at 2946-47 (emphasis in original) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 (plurality opinion)). The *Jurek* rule created a standard which the Court simply applied to the facts of Penry's case, *i.e.*, to his mitigating evidence. *See Parks*, 494 U.S. at 492, 110 S.Ct. at 1262. Despite the fact that the *specific holding* announced in *Penry* was novel and repudiated prior Fifth Circuit decisions, Penry's claim was not *Teague*-barred because it did not impose a new obligation on the state; the state already was obligated to

apply the *Jurek* standard. *Accord Stringer*, —— U.S. at ——-——, 112 S.Ct. at 1135-40 (Court applying the principle announced in *Godfrey*).

Penry thus demonstrates (and *Stringer* confirms) the critical distinction between the *extension* of an existing rule on collateral review and the mere *application* of an existing normative rule (such as *Godfrey/Cartwright*) to a new set of facts.[10] *Cf. Stringer*, —— U.S. at ——, 112 S.Ct. at 1135. Our court too has recognized this distinction. In *West v. Wright*, 931 F.2d 262 (4th Cir.1991), *rev'd on other grounds*, —— U.S. ——, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992), the petitioner raised a sufficiency of the evidence challenge under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The Commonwealth argued that granting the petitioner the relief he sought would have created a new rule in violation of *Teague*. *West*, 931 F.2d at 265. Specifically, the Commonwealth noted that, although *Jackson v. Virginia* came down before petitioner's conviction became final, a decision in his favor would have required our court to disregard Virginia's common law permissive inference that one in unexplained possession of stolen goods is the thief. *Id.* We rejected the *Teague* challenge: "Obviously, a federal habeas court cannot be said to apply a 'new constitutional rule' whenever it applies the *Jackson*

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[10] *See Chambers v. United States*, 22 F.3d 939, 942 (9th Cir.1994) ("We do not create a new rule when we simply apply 'a rule of this general application,' *Wright v. West*, —— U.S. ——, ——, 112 S.Ct. 2482, 2499 (Kennedy, J., concurring), to a new set of facts." (citing *Stringer, supra*)); *Beam v. Paskett*, 3 F.3d 1301, 1310 (9th Cir.1993) ("As the Supreme Court has recently noted [in *Stringer*], a rule is not 'new' simply because it is applied to a set of different facts. Because we simply applied the general *Herndon* rule [holding that any limitation upon individual liberty must have an appropriate relation to the safety of the state] to the specific facts of this case, we conclude that our holding does not create a 'new' rule." (citation omitted)), *cert. denied sub nom. Arave v. Beam*, —— U.S. ——, 114 S.Ct. 1631, 128 L.Ed.2d 354 (1994).

v. Virginia test to a 'new' set of facts in evidence." *Id.* at 266.[11]

A divided Supreme Court reversed our *West* decision on the merits after concluding there was sufficient evidence to support the petitioner's conviction under the *Jackson* standard; but the Court did not directly address the *Teague* issue. *See generally Wright v. West,* —— U.S. ——, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992).[12] However, in her concurring opinion, Justice O'Connor, the author of the plurality opinion in *Teague,* emphasized: "If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable." *Id.* at ——, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment). Justice Kennedy elaborated:

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. The rule of [*Jackson v. Virginia*] is an example. By its very terms it provides a general standard which calls for some ex-

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[11] *Accord Paradis v. Arave,* 20 F.3d 950, 953-54 (9th Cir.1994) (holding *Jackson v. Virginia* challenge is not barred by *Teague*; also holding that *Teague* did not bar application of either *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (due process requirement that a defendant be advised of all materials to be used against him in sentencing), or *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (Eighth Amendment rule requiring proportionate culpability for imposing death sentence)).

[12] Justice Thomas wrote an opinion joined by two other Justices. Justice O'Connor wrote an opinion joined by two other Justices. Justices White, Kennedy and Souter each wrote concurring opinions, none of which were joined by other Justices.

> amination of the facts. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Id. at ——, 112 S.Ct. at 2499 (Kennedy, J., concurring in the judgment); *see also Graham*, —— U.S. at ——, 113 S.Ct. at 918 (Souter, J., dissenting) (noting that "[o]ne general rule that has emerged under *Teague* is that application of existing precedent in a new factual setting will not amount to announcing a new rule").[13]

In sum, when we apply an extant normative rule to a new set of facts (leaving intact the extant rule) generally we do not announce a new constitutional rule of criminal procedure for purposes of *Teague*. To be sure, *Teague* is implicated "by the application of an old rule in a man-

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[13] This point was not lost on the second Justice Harlan, the father of our new rule jurisprudence. He emphasized that "it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has *simply applied* a well-established *constitutional principle* to govern a case which is *closely analogous* to those which have been previously considered in the prior case law." *Desist v. United States*, 394 U.S. 244, 263, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting) (emphasis added); *see also Mackey v. United States*, 401 U.S. 667, 695, 91 S.Ct. 1160, 1181, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). Other pre-*Teague* retroactivity cases similarly have highlighted this point. *See, e.g., Yates v. Aiken*, 484 U.S. 211, 216, 108 S.Ct. 534, 537, 98 L.Ed.2d 546 (1988) ("many 'new' holdings are merely applications of principles that were well settled at the time of conviction"); *United States v. Johnson*, 457 U.S. 537, 549, 102 S.Ct. 2579, 2587, 73 L.Ed.2d 202 (1982) ("[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.").

ner that was not dictated by precedent." *Stringer*, —— U.S. at ——, 112 S.Ct. at 1135; *cf. Butler*, 494 U.S. at 414-15, 110 S.Ct. at 1217-18. But when a rule provides a standard that of necessity requires a case-by-case examination, generally the results yielded by that application are not "new rules" because those results do not "break[ ] new ground or impose[ ] a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 (plurality opinion); *cf. Penry*, 492 U.S. at 315, 319, 109 S.Ct. at 2945, 2947 (emphasizing that the application of the pre-existing rule at issue did not impose a new obligation on the state). Rather, the state courts presumably are aware of the pre-existing rule and it is foreseeable to them that the rule is to be applied.

Consequently, although comity interests would have us defer to a state court's determination that a petitioner seeks the expansion or extension of a pre-existing rule, *i.e.*, a new rule, reflexive deference is inappropriate when we are asked to review a state court's application of that rule to the specific facts of a new case. Otherwise, we would have to say that *Teague* altered the standard of review on habeas, which the Supreme Court declined to hold in *Wright v. West*. *See West*, —— U.S. at ——, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment) ("In *Teague*, we refused to give state prisoners the retroactive benefit of new rules of law, but we did *not* create any deferential standard of review with regard to old rules."); *cf. Sawyer*, 497 U.S. at 239, 110 S.Ct. at 2830 ("Federal habeas corpus serves to ensure that state convictions comport with the *federal* law that was established at the time the petitioner's conviction became final.").[14]

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[14] We think Judge Luttig, in his opinion concurring in the judgment, overlooks the significance of *Wright v. West*. To reiterate, there the Court declined to hold that *Teague* established a deferential standard of review of state court decisions of federal law. *See West*, —— U.S. at ——, 112 S.Ct. at 2498 (Kennedy, J., concurring in the judgment) ("*Teague* did not establish a deferential

We now return to the instant case. *Godfrey* held that state courts must supplement facially vague aggravating factors with "constitutionally sufficient," *Walton*, 497 U.S. at 655, 110 S.Ct. at 3058, limiting instructions or appellate review. *Godfrey* and *Cartwright*, like *Jackson v. Virginia*, set forth "a general standard which calls for some examination of the facts," *West*, —— U.S. at ——, 112 S.Ct. at 2499 (Kennedy, J., concurring in the judgment) —namely, examination of the language of the particular limiting instruction or the appellate review at issue. Although the state courts below may have relied on *Turner v. Bass, supra*, in concluding that the limiting construction

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standard of review of state court decisions of federal law."). Rather, the familiar standards still control: On federal habeas a state court's factual findings are "presumed to be correct," 28 U.S.C. § 2254(d), whereas its findings on questions of law and mixed questions of fact and law receive independent federal consideration, *Miller v. Fenton*, 474 U.S. 104, 115, 106 S.Ct. 445, 452, 88 L.Ed.2d 405 (1985). We believe that it is not a question of historical fact whether a state court has given a constitutionally sufficient limiting instruction for a vague aggravating factor or whether a state court has provided constitutionally sufficient appellate review of a sentence based a vague factor. Therefore, the sufficiency of the limiting instruction or appellate review is reviewed *de novo*.

Judge Luttig, however, suggests that so long as a reasonable state court jurist finds the instruction/appellate review at issue to be constitutionally sufficient (more accurately, if the jurist would not have felt compelled to find the instruction or review constitutionally insufficient), we defer to the state court's judgment. To us, this is contrary to *Miller* and *West*. *See West*, —— U.S. at ——, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment) ("[W]e have [not] held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is."); *id.* at ——, 112 S.Ct. at 2499 (Kennedy, J., concurring in the judgment) ("The comity interest [underlying *Teague*] is not, however, in saying that since the question is close the state court decision ought to be deemed correct because we are in no better position to judge.").

of "aggravated battery" given to Turner's jury and applied on review was constitutionally sufficient, that conclusion is not subject to a deferential standard of review under *Teague*. To borrow the language from *Penry*, *Godfrey* upheld the statutory vileness factor on the basis of "assurances" that the sentencer's discretion would be channelled by constitutionally sufficient standards. Turner "argues that those assurances were not fulfilled *in his particular case* because, without appropriate instructions [or appellate review, his sentencer's discretion could not be channelled by clear and objective standards]. . . . [I]n light of the assurances upon which [*Godfrey*] was based, we conclude that the relief [Turner] seeks does not 'impos[e] a new obligation' on the State of [Virginia]." *See Penry*, 492 U.S. at 318-19, 109 S.Ct. at 2946-47 (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1077 (plurality opinion)).[15]

In the final analysis, we hold that, in challenging the Commonwealth's application of its vileness factor in his case, Turner does not "seek[] the benefit of a new rule,"

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[15] Judge Luttig takes the position that a holding in Turner's favor "would, quite obviously, impose a 'new obligation' on the Commonwealth of Virginia," *post*, at 919-20 (citation omitted), but he says that the holding in *Penry* "vacating Penry's death sentence, and requiring an additional instruction that the jury could consider his mitigating evidence as such, did not 'impose a new obligation' on the State of Texas," *id.* at ——-—— n. 4 (citation omitted). According to Judge Luttig, *Penry* did not impose a new obligation because "such an obligation"—that the state could not foreclose altogether the sentencer's consideration of a defendant's mitigating evidence—"had already been imposed by prior law." *Id.* But in the instant case, as in *Penry*, there is an extant obligation imposed on the states: When a state uses a vague aggravating factor, the state's limiting instruction or appellate review must be constitutionally sufficient. *See supra* note 9. The question presented in *Penry* and the instant case is the same: has the state fulfilled its obligation. As Judge Luttig's discussion of *Penry* indicates, a federal court's finding that a state failed to fulfill an extant obligation does not necessarily impose a new obligation.

Bohlen, —— U.S. at ——, 114 S.Ct. at 953, for purposes of *Teague*. Accordingly, *Teague* does not bar us from reaching the merits.

B. *The Applicability of* Teague v. Lane *to Turner's Ineffective Assistance of Counsel Claims*

Turner claims that his lawyers at the resentencing proceeding rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 104 S Ct. 2052, 80 L.Ed.2d 674 (1984). Although *Stirckland* was decided four years before Turner's conviction became final, the Commonwealth contends that Turner's *Strickland* claims are *Teague*-barred. The Commonwealth's *Teague* challenge is predicated on its view that, "under the facts of this case 'reasonable jurists reading the case law that existed' in 1988 could have concluded that defense counsel were not ineffective. . . ." Appellee's Br. at 9. As noted above, *Teague* does not mandate deference to a state court's application of law to fact. *See generally Wright v. West*, *supra*. Rather, mixed questions of law and fact are subject to *de novo* review on habeas. *Miller v. Fenton*, 474 U.S. 104, 112, 106 S.Ct. 445, 450-51, 88 L.Ed.2d 405 (1985). And, whether counsel rendered ineffective assistance is a mixed question of law and fact. *Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070. *Teague* thus does not mandate deference to the Virginia courts' application of *Strickland* to the facts of Turner's case. We therefore reject the Commonwealth's argument that *Teague* bars us from reaching the merits of Turner's various ineffective assistance of counsel claims.[16]

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[16] "Because *Teague* and its Supreme Court progeny . . . have sent somewhat inconsistent signals, the circuit courts have had difficulty in coherently following those cases." 8C James W. Moore et al., *Moore's Federal Practice* § 14.06[4], App. 14-102.5 (2d ed. 1994). Yet Judge Luttig tells us that the Supreme Court's new rule cases have been consistent and clear. Despite that alleged consistency, his opinion is devoted in large measure to a discussion of but one case, *Graham v. Collins*, *supra*, a case which he says

III

The Commonwealth next contends that Turner procedurally defaulted on most of his claims. First, it says he

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we have ignored. We have not ignored *Graham*. Rather, because we think the Court has not spoken in one clear voice, we have attempted to reconcile the Court's new rule cases. To that end, our attention was drawn to *Stringer* and *Penry*, the two new rule cases where the Court found no *Teague* problem. We think the instant case is more like *Stringer* and *Penry* than *Graham* and the Court's other new rule cases.

Before addressing the distinction between *Penry* and *Graham*, we pause to comment on Judge Luttig's assessment of *Stringer* as "an unexceptional application of the Court's consistently-applied standard," *post*, at 912-13. This would come as a surprise to the three *Stringer* dissenters. For one thing, *Stringer* held that *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), did not announce a new rule despite the fact that an earlier case, *Zant v. Stephens*, 462 U.S. 862, 890, 103 S.Ct. 2733, 2749-50, 77 L.Ed.2d 235 (1983), had expressly left undecided the constitutional issue decided in *Clemons*—whether in a "weighing" state the state court must reweigh aggravating factors against mitigating evidence if one of the aggravating factors used by the sentencer is held to be invalid. The *Stringer* dissenters were thus baffled about how a reasonable jurist at the time Clemons's conviction became final could have felt compelled to conclude that the result in *Clemons* was dictated by precedent when precedent (*Stephens*) expressly left the issue undecided. *See Stringer*, —— U.S. at ——, 112 S.Ct. at 1144 (Souter, J., dissenting).

More significant is the *Stringer* majority's response to the dissent's insistence that the result in *Clemons* was not dictated by extant case law.

> When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence. This clear principle *emerges not from any single case*, as the dissent would require, *. . . but from our long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing.*

Id. —— U.S. at ——, 112 S.Ct. at 1137 (emphasis added). In other words, although the result in *Clemons* was not dictated by a particular case, *Clemons* did not announce a new rule because the result "emerged" from the principle that sentencing must be "precise and individualized." We think this is a less restrictive

procedurally defaulted on his challenges to the application of the statutory vileness factor because the Supreme Court of Virginia found these claims procedurally de-

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standard than that employed in *Graham* (and endorsed by Judge Luttig) and consequently we disagree with Judge Luttig's position that *Stringer* was a run-of-the-mill *Teague* case.

Moving on to the relationship between *Penry* and *Graham*, we are not persuaded by how Judge Luttig has reconciled the two cases. The cases are distinguishable: *Penry* involved the application of a pre-existing rule to a new set of facts, whereas *Graham* involved a petitioner seeking the benefit of a brand new rule of law, *i.e.*, an extension of a pre-existing rule. Specifically, in *Penry* the Court applied to Penry's facts the preexisting rule set forth in the *Jurek/Lockett/Eddings* line of cases—relevant mitigating evidence must not be placed beyond the effective reach of the sentencer. However, as Judge Luttig observes, Graham's evidence was not placed beyond the sentencer's reach. *See post*, at 910-11 ("Penry's jury was not, but Graham's was, permitted to consider mitigating evidence as such. . . ."). Graham argued that under the Texas scheme a defendant is entitled to special instructions whenever he can offer mitigating evidence that has some arguable relevance beyond Texas's "special issues." *See id.* at 911 n. 4 ("Vacating Graham's death sentence, by contrast, would have required a holding that Texas could not channel the effect of a defendant's mitigating evidence at all."). Graham thus sought more than the application of a pre-existing rule; he sought an extension of the *Jurek/Lockett/Eddings* line of cases (and thus sought the benefit of a whole new rule).

Of course, as Judge Luttig observes, *see id.* at 909, Graham thought he sought merely the application of a pre-existing rule. But at best, what Graham actually sought was the application of pre-existing *principles* (those underlying the *Jurek/Lockett/Eddings* line of cases). In short, Graham's problem was that he invoked a pre-existing rule at too high a level of generality. As Justice Souter has observed:

> The crux of the analysis when *Teague* is invoked . . . is identification of the rule on which the claim for habeas relief depends. To survive *Teague*, it must be . . . specific enough to dictate the rule on which the conviction may be held to be unlawful. . . . [P]assing on its requisite specificity calls for analytical care.

West, —— U.S. at ——, 112 S.Ct. at 2501 (Souter, J., concurring in the judgment). Because it is our legal tradition that develop-

faulted. *See Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (generally, when a habeas petitioner has defaulted on a federal claim in

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ments in the law be guided by extant principles, virtually every habeas petitioner will contend that a general principle, *e.g.*, that the death penalty not be "arbitrarily and capriciously" inflicted, dictates the rule he seeks. *Teague* would be meaningless if habeas petitioners could benefit from the application of pre-existing rules at too high a level of generality. *Sawyer*, 497 U.S. at 236, 110 S.Ct. at 2828.

Judge Luttig in essence charges us with applying *Godfrey* at too high a level of generality. Under his reading of *Godfrey*, a jury instruction on an aggravating factor can be reviewed on habeas in only two situations: (1) where, as in *Godfrey*, a jury is given the bare terms of a "vague" aggravating factor, and (2) where, as in *Cartwright*, a jury is given a limiting construction which gives " 'no more guidance than did the statute in *Godfrey*,' " *post*, at 915 (quoting *Stringer*, —— U.S. at ——, 112 S.Ct. at 1135), *i.e.*, where the "instruction provide[s] no limitation whatsoever on the jury's discretion," *id.* But how do we know whether a limiting instruction provides "no more guidance" or "no limitation whatsoever"? To find out, we must review the factor or limiting construction to assess its constitutional sufficiency. *See supra* note 9 (discussing *Walton v. Arizona* (non-habeas case) and *Lewis v. Jeffers* (habeas case)). Yet Judge Luttig takes us to task for conducting this "full merits review," *post*, at 904. Put another way, Judge Luttig seems to say that review of the constitutional sufficiency of a limiting construction (*i.e.*, a review on the merits) is not *Teague*-barred if the limiting construction is constitutionally insufficient, which we would not know unless we undertook a review on the merits, which Judge Luttig says we are barred from doing.

We are no less intrigued by Judge Luttig's conclusion that Turner's ineffective assistance claims are not *Teague*-barred. Judge Luttig vehemently stresses that "*Teague* bars consideration of a claim where the defendant could not even prevail on the merits," *id.* at 911, and that "avoidance of a new rule is possible only where the prior precedent resolves the case in the petitioner's favor," *id.* at 911. Yet he concludes that *Teague* does not bar consideration of Turner's ineffective assistance claims, *see id.* at 84 n. 14, despite the fact that Turner does not prevail on the

state court pursuant to an independent and adequate state procedural rule, federal review of the defaulted claim is barred); *Harris v. Reed*, 489 U.S. 255, 109 S.Ct.

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merits of these claims. Put another way, Turner's constitutional challenges to his lawyers' performance are not *Teague*-barred even though reasonable jurists would not have felt compelled to conclude that Turner's lawyers were constitutionally deficient. (For example, reasonable jurists would not have felt compelled to conclude that it was necessarily ineffective assistance to inform a venire that a petitioner was previously sentenced to death by a different jury for the same crime.)

In the final analysis, and contrary to Judge Luttig's suggestions, we have not "alter[ed] for this circuit the Supreme Court's 'new rule' jurisprudence," *id.* at 904, nor have we "disregard[ed] . . . Supreme Court authority," *id.* at 905. At bottom, we disagree with Judge Luttig that there is an "unambiguous directive," *id.* at 910, in the Supreme Court's new rule cases. Most of the Court's new rule cases were five-to-four decisions with shifting majorities. Indeed, in *Wright v. West*, Justice O'Connor, the author of the *Teague* plurality opinion, issued an opinion (joined by two Justices) in which she attempted to define what constitutes a new rule, *see West*, —— U.S. at ——, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment); Justice Thomas's opinion (also joined by two Justices) "disagree[d], however, with Justice O'Connor's definition of what constitutes a 'new rule' for *Teague* purposes." *Id.* —— U.S. at —— n. 8, 112 S.Ct. at 2490 n. 8 (plurality opinion).

We have not created a new standard today. We hold simply that the application of a preexisting normative rule, a rule which by its nature contemplates prospective application, generally is not *Teague*-barred. Hence our *dictum* that *Godfrey* "dictates Turner's challenge," *supra* p. 881; *cf. supra* p. 882, for the challenge is simply the application of the preexisting rule. And notwithstanding Judge Luttig's parade of horribles, our decision will not "render reviewable on *habeas* essentially every claim," *post*, at 908. *Teague* controls when a petitioner does not seek the application of an old rule or when a petitioner seeks to apply an old rule in a manner not dictated by precedent, "thereby extending the precedent." *Stringer*, —— U.S. at ——, 112 S.Ct. at 1135. We, to be sure, do "recognize[ ] the inevitable difficulties that will arise in attempting to determine whether a particular decision has

1038, 103 L.Ed.2d 308 (1989). Second, it says he procedurally defaulted on one of his ineffective assistance claims (challenging counsel's failure to put on mitigating evidence described in the opening statement) because it was never raised in the state courts. *See Bassette v. Thompson*, 915 F.2d 932, 936-37 (4th Cir.1990) (ineffective assistance claims not raised on state habeas are procedurally defaulted) (citing *Teague*, 489 U.S. 297-99, 109 S.Ct. at 1068-69), *cert. denied*, 499 U.S. 982, 111 S.Ct. 1639, 113 L.Ed.2d 734 (1991). We will address the Commonwealth's procedural default arguments in turn and ultimately conclude that Turner has not procedurally defaulted on these claims.

A. *Challenges to the Application of the Vileness Factor*

Turner challenges the application of the vileness factor in several respects. In overlapping arguments, he says (1) the limiting definitions (instructions) for "aggravated battery" and "depravity of mind" were constitutionally insufficient, (2) the Supreme Court of Virginia's direct review of his sentence was inadequate, (3) the facts of the Smith murder do not support the vileness factor, and (4) the Supreme Court of Virginia generally does not provide capital defendants with meaningful appellate review. These various allegations were scattered through-

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really announced a new rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." *Penry*, 492 U.S. at 314, 109 S.Ct. at 2944 (internal quotation marks omitted) (quoting *Mackey v. United States*, 401 U.S. 667, 695, 91 S.Ct. 1160, 1181, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part), in turn quoting *Desist v. United States*, 394 U.S. 244, 263, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting)); *see also Graham*, —— U.S. at ——, 113 S.Ct. at 918 (Souter, J., dissenting) ("it can be a difficult question whether a particular holding presents simply a new setting for an old rule, or announces a new one"). This difficulty, however, must be attributed to *Teague* and its progeny, not to us.

out claims VII and XIV of Turner's state habeas petition.[17] The Supreme Court of Virginia, on collateral review, held that these claims were procedurally defaulted, stating:

> Applying the rule in *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974) . . . to the extent allegations numbered VII, VIII, XIV, XV, and XVI in his petition for writ of habeas corpus advance matters not asserted on direct appeal; and, applying the rule in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to allegations [VII, VIII, XIV, XV, and XVI] . . . to the extent that they advance matters asserted on direct appeal, the petition for appeal is denied for reasons of procedural default.

Turner v. Williams, No. 901335 (Va. Apr. 30, 1991). *Slayton* generally says that claims that could have been raised on direct appeal, but were not, cannot be raised on state collateral review. *Slayton*, 205 S.E.2d at 682. *Hawks* has been read to say that claims raised and decided against petitioner on direct review cannot be raised on state habeas. *See Hawks*, 175 S.E.2d at 274. Thus, the Supreme Court of Virginia dismissed these claims either because they were raised and decided on direct appeal (*Hawks*) or because they were not raised on direct appeal (*Slayton*).

Slayton is a valid procedural default rule. *Smith v. Murray*, 477 U.S. 527, 533-39, 106 S.Ct. 2661, 2665-69, 91 L.Ed.2d 434 (1986). *Hawks*, however, is not a true procedural default rule; rather, it is more in the nature of a collateral estoppel rule. *Hawks* cannot prevent federal habeas review of federal constitutional claims

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[17] In claim VII he argued that there was an insufficient factual basis to find depravity of mind or an aggravated battery. In claim XIV he argued that the vileness factor was vague on its face, that the limiting definitions of "aggravated battery" and "depravity of mind" also were vague, and that the Virginia Supreme Court's appellate review was deficient both generally and in his case.

properly raised on direct appeal. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-07, 111 S.Ct. 2590, 2595-96, 115 L.Ed.2d 706 (1991). Thus, we must ascertain whether Turner raised on direct appeal the aforementioned challenges to the application of the vileness factor. If he did, he is not procedurally barred from raising them here.

In his brief to the Supreme Court of Virginia on direct appeal, Turner argued that the murder of Smith was not vile, *i.e.*, that the murder involved neither depravity of mind nor an aggravated battery. He also argued that imposition of the death sentence for the murder of Smith would be disproportionate to the crime when viewed in comparison to other cases where the death sentence was predicated solely on the vileness factor. Moreover, he attacked the vileness factor (and the Virginia death penalty statute) on its face as being unconstitutionally vague and overbroad.

As for the sufficiency of the limiting definitions given to his jury, Turner's brief on direct appeal contained a subsection entitled: "This Court must adopt stricter standards for defining and applying the vileness aggravating circumstance." JA 553. In this subsection, Turner argued:

> This Court should make clear that an aggravated battery must be one which, qualitatively and quantitatively, is *much more vile than* the minimum necessary to accomplish the act of murder, and that "depravity of mind" is a degree of moral turpitude and psychical debasement that *far* surpasses that inherent in the definition of legal malice and premeditation.

JA 553-54 (emphases in original). The highlighted portions above represented his suggested modifications to the limiting definitions given to his jury; without those modifications, he argued, the instructions were constitutionally deficient. *See Turner*, 364 S.E.2d at 488 n. 2 ("Turner

argues that we must apply stricter standards for determining 'vileness' or else face the risk of having the present standards declared unconstitutional. We reject this argument.").

Finally, as for Turner's attack on Virginia's *system* of appellate review generally, Turner listed as one of ten questions presented on direct appeal: "3. Does this Court provide adequate appellate review of death sentences?" JA 544. Listed as an assignment of error was an allegation "[t]hat the failure of the Virginia courts to afford adequate appellate review of death sentences means that death sentences are being imposed in Virginia in an arbitrary and capricious manner, in violation of the Eighth and Fourteenth Amendments to the United States Constitution." JA 545.[18]

In sum, Turner's various challenges to the application of the vileness factor were raised on direct appeal and therefore the Supreme Court of Virginia (on collateral review) must have dismissed these claims under *Hawks*, not *Slayton*. Accordingly, because *Hawks* does not bar us from reviewing the merits of federal constitutional claims properly raised on direct appeal, we reject the Commonwealth's argument that Turner is procedurally barred from raising these claims on federal habeas.

B. *Ineffective Assistance Challenge*

We also reject the Commonwealth's argument that Turner procedurally defaulted on his ineffective assistance claim arising from counsel's failure to put on the

[18] Of course, Turner's challenge to the appellate review of his own sentence could not have been raised on direct appeal, because appellate review had yet to take place (though he did argue in his brief on direct appeal: "If this Court fails to reverse the jury's verdict, the Court will have failed to provide adequate appellate review of the propriety of the death sentence." JA 547). This claim was raised in his state habeas petition and in his habeas Petition for Appeal to the Supreme Court of Virginia and therefore was properly exhausted.

mitigating evidence described in the opening statement. Turner's state habeas petition alleged that "[c]ounsel failed to present mitigating evidence . . . despite defense counsel's opening statement to the jury that several witnesses would testify on Mr. Turner's behalf." JA 591. The state habeas court held an evidentiary hearing in part to address counsel's failure to put on mitigating evidence. After the hearing, Turner submitted to the court proposed findings of fact and conclusions of law, wherein he argued that the "broken promises made by Mr. Snook to the jury in his opening statement" were "independently prejudicial." JA 1315. He continued:

> "We cannot but conclude that to promise even a condensed recital of such powerful evidence, and then not produce it, could not be disregarded as harmless. *We find it prejudicial as* [*a*] *matter of law.*" *Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir.1988) (emphasis added). In that case, the Court of Appeals reversed the district court's denial of habeas corpus based on facts nearly identical to those here.

Id.; see also JA 1397. The Commonwealth responded to this argument in its proposed findings of fact and conclusions of law. JA 1432 (¶ 26). Then, in his (habeas) Petition For Appeal to the Supreme Court of Virginia, Turner argued:

> Even if counsel knew that he could keep his promises (as Mr. Snook could not have known), it still would be "prejudicial as [a] matter of law" to "promise even a condensed recital of such powerful evidence, and then not produce it." *Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir.1988).

JA 1595-96 (footnotes omitted). In an accompanying footnote, Turner noted that "[o]ther courts have found counsel ineffective based in part on the failure to deliver evidence promised in opening statements." JA 1596.

We conclude that Turner has fairly presented this ineffective assistance claim in the state collateral proceedings and therefore hold that he is not barred from raising it on federal habeas. Having concluded that Turner's claims are not procedurally barred, we now turn to the merits.

IV

As noted above, Turner raises numerous challenges to the application of the vileness factor, several of which are interrelated.

He first says the jury instructions inadequately defined the vileness factor. More particularly, he says that the limiting definitions for "aggravated battery" and "depravity of mind" were constitutionally insufficient. The jury was instructed that "an aggravated battery is a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder." JA 517-P. The jury also was instructed that "depravity of mind is a degree of moral turpitude and and [sic] psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." JA 517-Q. The court further defined malice and premeditation. Turner says that these definitions are incomprehensible and that they fail to narrow the class of persons eligible for the death penalty. *See Arave v. Creech*, —— U.S. ——, ——, 113 S.Ct. 1534, 1542, 123 L.Ed.2d 188 (1993) (the language of a limiting construction must be determinate and "must 'genuinely narrow the class of persons eligible for the death penalty' " (quoting *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983))).

We have on several occasions upheld limiting definitions that were identical or virtually identical to those challenged here. *See, e.g., Jones*, 976 F.2d at 174-75 (holding that identical limiting definitions of depravity of mind and aggravated battery "were specific and provided adequate guidance to the jury" as required by

Godfrey). Recognizing that "the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision," *Walton*, 497 U.S. at 655, 110 S.Ct. at 3058, we believe the limiting definitions here are sufficiently clear and objective. And, as we have previously observed, the limiting definitions adequately narrow the class of persons eligible to receive the death penalty because a juror of ordinary sensibility would not find that all murders involve depravity of mind or an aggravated battery. "The instructions clearly direct the jury away from that result by requiring that something extra be present, *i.e.*, either force greater 'than the minimum necessary to accomplish an act of murder' or 'a degree of psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.'" *Jones*, 976 F.2d at 174-75. We therefore reaffirm our prior holdings, which we think are amply supported by the Supreme Court's recent decision in *Creech*.

In *Creech*, the death sentence was based in part on Idaho's utter disregard factor: "[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life." —— U.S. at ——, 113 S.Ct. at 1538 (quoting Idaho Code § 19-2515 (g)(6) (1987)). Idaho had adopted a limiting construction, whereby the utter disregard factor was "meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *Id.* at ——, 113 S.Ct. at 1539. The Supreme Court held that this construction satisfied constitutional requirements. *Id.* at ——, 113 S.Ct. at 1541. Surely the limiting construction applied in Turner's case is as clear and objective as, and satisfies the narrowing requirement as well as, the construction upheld in *Creech*. *See also Walton*, 497 U.S. at 654, 110 S.Ct. at 3057-58 (upholding Arizona court's limiting construction which said a murder was "especially cruel" if "the perpetrator in-

flicts mental anguish or physical abuse before the victim's death," with mental anguish including "a victim's uncertainty as to his ultimate fate") (internal quotation marks omitted); *compare Shell v. Mississippi*, 554 So.2d 887, 905-06 (Miss.1989), *rev'd per curiam*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) (holding unconstitutional a limiting construction of Mississippi's heinousness factor); *Cartwright*, 822 F.2d at 1488, *aff'd*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (holding unconstitutional a limiting construction of Oklahoma's heinousness factor).[19]

Turner also claims that the Supreme Court of Virginia's appellate review of his sentence was inadequate because that court "allowed the death sentence to stand even though . . . the crime was less culpable than the conduct in other death penalty cases or in many cases in which the defendant was sentenced to life imprisonment." Appellant's Br. at 50. He further "argues that the Virginia system does not provide capital defendants meaningful appellate review, even in cases in which the results appear arbitrary." *Id.* at 57. However, because we have held that the Virginia courts applied a constitutionally sufficient limiting construction for the vileness factor in Turner's case, it is clear from the Supreme Court's cases that these additional claims carry no constitutional weight. For instance, in *Walton, supra*, the Supreme Court upheld the state court's limiting construction and then disposed of arguments similar to those raised by Turner here:

> Walton nevertheless contends that the heinous, cruel, or depraved factor has been applied in an arbitrary manner and, as applied, does not distinguish

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[19] According to Turner, *Godfrey* says that an aggravated battery requires "evidence of serious physical abuse of the victim before death." Appellant's Br. at 48 (quoting *Godfrey*, 446 U.S. at 431, 100 S.Ct. 1759 (plurality opinion)). We disagree. We agree instead with the district court below that Turner misreads Justice Stewart's plurality opinion. *See Turner*, 812 F.Supp. at 1423 n. 31.

> his case from cases in which the death sentence has not been imposed. In effect Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we "lawfully may presume that [Walton's] death sentence was not 'wantonly and freakishly' imposed—and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment."

497 U.S. at 655-56, 110 S.Ct. at 3058-59 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 306, 308, 107 S.Ct. 1756, 1774-75, 1775, 95 L.Ed.2d 262 (1987)); *see also Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) ("Our decision in *Walton* thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting . . . the sentencer's discretion in imposing the death penalty,' has been satisfied." (citation omitted) (quoting *Cartwright*, 486 U.S. at 362, 108 S.Ct. at 1858)); *Creech*, —— U.S. at ——, 113 S.Ct. at 1544 ("our decisions do not authorize review of state court cases to determine whether a limiting construction has been *applied* consistently").

In any event, the Supreme Court of Virginia's review of Turner's sentence was adequate. The court found that the evidence was sufficient to trigger the vileness factor. *See Turner*, 364 S.E.2d at 488-89. Moreover, pursuant to Virginia law, the court determined that the sentence (1) was not "imposed under the influence of passion, prejudice or any other arbitrary factor," and (2) was not "excessive or disproportionate to the penalty imposed in

similar cases, considering both the crime and the defendant." *Id.* at 490 (quoting Va.Code Ann. § 17-110.1(C) (Michie 1992)). The court conducted a proportionality review based on the records of all Virginia capital felony cases and found that Turner's murder was "just as brutal" as the murders in other cases where the death sentence was imposed. *Id.* The court concluded "that juries in this jurisdiction generally approve of the death penalty for offenses comparable to the murder committed by Turner." *Id.* at 491 (citing *Barnes v. Commonwealth*, 234 Va. 130, 360 S.E.2d 196, 203 (1987) ("vileness" found in murder of store employee shot three times during struggle with robber; *Barnes* held "that a killing inflicted by multiple gunshot wounds may constitute an 'aggravated battery' . . . where there is an appreciable lapse of time between the first shot and the last, and where death does not result instantaneously from the first"), *cert. denied*, 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988)). In short, the Supreme Court of Virginia "plainly undertook its proportionality review in good faith," and "[t]he Constitution does not require us to look behind [its] conclusion." *Walton*, 497 U.S. at 656, 110 S.Ct. at 3058.

Turner's general attack on the Virginia system of appellate review is equally unpersuasive; the Virginia system does provide for meaningful review and its results are fairly consistent.[20]

Turner's final claim is that, even if the vileness factor has been constitutionally defined, the facts of his case do not fit within that factor, *i.e.*, the vileness factor does not apply to him. A challenge to a state court's application

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[20] In support of his argument that the Virginia Supreme Court arbitrarily applied the vileness factor in his case, Turner provides a litany of cites to Virginia death penalty cases which, according to him, involved murders with "significantly greater brutality" than his. Appellant's Br. at 54. But these cases go to demonstrate that Virginia consistently reserves the vileness factor for the most gruesome facts, thereby deflating his argument that Virginia imposes the death penalty in an arbitrary and capricious manner.

of an aggravating factor, however, raises primarily a question of state law: "[F]ederal habeas review of a state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Jeffers*, 497 U.S. at 780, 110 S.Ct. at 3102. "A state court's finding of an aggravating circumstance in a particular case . . . is arbitrary or capricious if and only if no reasonable sentencer could have so concluded." *Id.* at 783, 110 S.Ct. at 3103. The "standard of review is the 'rational factfinder' standard established in *Jackson v. Virginia.*" *Id.* at 781, 110 S.Ct. at 3101-02; *see also Creech*, —— U.S. at ——, 113 S.Ct. at 1544; *Richmond v. Lewis*, —— U.S. ——, ——, 113 S.Ct. 528, 536, 121 L.Ed.2d 411 (1992).

We conclude that a rational sentencer could have found that the murder of Smith involved either depravity of mind or an aggravated battery. Turner emphasizes that his murder cannot possibly be considered an aggravated battery because he rapidly fired two successive shots into Smith's chest, either one of which may have been fatal. However, Turner shot Smith in the head before he fired the two shots into Smith's chest. And, between the shot to the head and the shots to the chest, enough time elapsed for Officer Bain to talk to Turner and for two customers to escape from the store. As the Supreme Court of Virginia emphasized on direct review in *Turner I:* "After being wounded [in the head] by Turner, Smith slumped helplessly behind the counter. Unlike Godfrey's victims, Smith did not die instantaneously from a single discharge of a firearm." *Turner*, 273 S.E.2d at 45. Thus, a rational factfinder could have found an aggravated battery here and therefore we reaffirm our conclusion in *Turner I*, where "[w]e reject[ed] Turner's contention that his crime was not so vile as to justify the imposition of death." *Turner*, 753 F.2d at 353.

In sum, we hold that the vileness factor was constitutionally applied in Turner's case.

V

Turner contends that his appointed lawyers, J. Lloyd Snook, III and Thomas L. Woodward, Jr., rendered ineffective assistance.[21] He challenges Snook's assistance in six respects: (1) his investigation of mitigating evidence, (2) his supervision and preparation of the mental health expert, (3) his failure to interview prosecution witnesses, (4) his informing the venire that a prior jury sentenced Turner to death for the same crime, (5) his failure to present any mitigating evidence, and (6) his failure to put on the evidence described in the opening statement.

We evaluate ineffective assistance claims under the standard set forth in *Strickland v. Washington, supra.* Under *Strickland*, an ineffective assistance claim has two components. First, defendant must show that counsel's performance was deficient, *i.e.*, "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S.Ct. at 2064-65. Second, defendant must show that he was prejudiced by the deficient performance. *Id.* at 687, 104 S.Ct. at 2064. When a defendant challenges a death sentence, prejudice is established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2069. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. As explained

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[21] Woodward served in a limited capacity as Snook's co-counsel. Turner's challenges are directed in large measure against Snook. In discussing Turner's claims, we will refer to Snook unless otherwise appropriate.

below, we conclude that Turner has not carried his burden under *Strickland*.[22]

A. *Pretrial Preparation*

1. *Investigation of Mitigating Evidence*

Turner argues that Snook inadequately investigated, or failed to investigate, certain mitigating evidence, namely evidence relating to (a) his background and (b) his role in a 1984 death row escape from Mecklenburg Correctional Center. His allegations focus on Snook's performance during the five-month period between Snook's July 31, 1986, appointment and the January 1987 resentencing proceeding. Viewing this period in isolation, we agree Snook spent relatively little time investigating and developing mitigating evidence. However, we cannot ignore the fact that he was not a blank slate when he was appointed in July 1986. Quite the contrary. Snook had been working on Turner's case since 1980, when he was appointed to represent Turner on direct appeal in *Turner I*. Snook represented him in the *Turner I* state and federal habeas proceedings, including Turner's victory in the United States Supreme Court in *Turner v. Murray*, *supra*. By the time of the resentencing hearing, Snook had devoted approximately 1,000 hours to Turner's case, including approximately 250 hours after the July 1986 appointment. (Woodward, moreover, began working on Turner's

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[22] The state habeas court held an evidentiary hearing (the "state habeas hearing") on Turner's ineffective assistance claims. Although a state court's findings of historical fact are presumed correct under 28 U.S.C. § 2254(d), see *supra* note 14, Turner argues that we should not defer to the state habeas court's findings here because the court adopted verbatim the Commonwealth's proposed findings of fact. Providing examples, he further maintains that the record does not support many of these findings. We think these examples either are insignificant or involve conclusions drawn from historical facts. In any event, we have conducted an independent review of the record, and we are satisfied that counsel rendered effective assistance.

case in 1979, when he was appointed to serve as co-counsel in the *Turner I* murder trial and capital sentencing proceeding.)

Snook thus was knowledgable about Turner's case when he was reappointed in 1986. More importantly, Snook was aware of the mitigating evidence that had been deloped for the *Turner I* capital sentencing proceeding and related collateral proceedings. At the original sentencing proceeding, for instance, several mitigation witnesses testified, including a psychiatrist and Turner's mother, aunt and first cousin. More significant was the evidence developed during the federal habeas phase of *Turner I*. There, ironically, Snook attempted to show that Turner's trial counsel rendered ineffective assistance for inadequately investigating mitigating evidence. In order to advance that claim, Snook necessarily had to develop additional mitigating evidence. He delegated that task to Marie Deans, the Executive Director of the Virginia Coalition on Jails and Prisons (an organization that, *inter alia*, assisted attorneys handling capital trials and appeals). Deans had assisted with many capital cases.

Deans interviewed by telephone (on multiple occasions) Turner's sister and uncle, neither of whom testified at the original sentencing trial. She also interviewed numerous other potential character witnesses. Deans then prepared reports for Snook that highlighted the results of her investigation. These reports provided part of the substance for a motion to alter or amend judgment filed in federal court in 1984.

Another development in 1984 was Turner's involvement in the escape of death row inmates from Mecklenburg Correctional Center; although Turner did not escape, he was involved in the planning and execution of the breakout. Snook had five clients on death row at Mecklenburg at the time. Within a week after the escape, he went to Mecklenburg to conduct an investigation. He may have spoken with as many as ten guards and inmates

(including Turner) with firsthand knowledge of the escape, and Deans "had talked with a bunch more." JA 1291. Snook also spoke with officials at the Attorney General's Office and the Governor's Office, the head of the Corrections Board, and the Director of the National Prison Project of the American Civil Liberties Union, all of whom were involved in the investigation of the incident. Furthermore, he was present when Turner was interviewed by the police shortly after the incident. As a result of these efforts, Snook had in his possession prior to resentencing a comprehensive file relating to the 1984 Mecklenburg escape, and he was aware of potential mitigating and aggravating testimony.

In sum, by the time of his appointment in July 1986, Snook generally was familiar with Turner's potential mitigating evidence. With this background in mind, we address Turner's challenge to the adequacy of Snook's pretrial investigation.

a. Background evidence

Turner first challenges Snook's investigation of evidence relating to his early and formative years, alleging that Snook (i) failed to conduct face-to-face interviews or meet personally with potential defense witnesses prior to the resentencing proceeding (they met after the proceeding was underway), (ii) failed to contact other persons who might have had knowledge about Turner's early and formative years, and (iii) failed to conduct an adequate interview of Turner.

As for Snook's failure to conduct face-to-face (as opposed to telephone) interviews or meet personally with defense witnesses prior to the resentencing proceeding, Snook did not deem such meetings necessary because he generally was familiar with the substance of what these witnesses would say. For instance, he had reviewed a number of times the potentially mitigating evidence that Deans had collected. In addition, he had telephoned

potential defense witnesses the month before the resentencing proceeding. Although face-to-face meetings with witnesses may be the more desirable approach, we cannot say that Snook's performance was unreasonable. *See Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987) ("[Counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.' " (quoting *United States v. Cronic*, 466 U.S. 648, 665 n. 38, 104 S.Ct. 2039, 2050 n. 38, 80 L.Ed.2d 657 (1984))). Moreover, Turner fails to explain what additional evidence would have been obtained from face-to-face interviews or meetings. *See Bassette*, 915 F.2d at 940-41 (when challenging the adequacy of counsel's investigation, defendant must show what an "adequate" investigation would have uncovered).

As for Snook's failure to contact more people familiar with Turner's background, counsel's duty to investigate is limited to a reasonable investigation. *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. "Particularly when evaluating decisions not to investigate further, we must regard counsel's choices with an eye for 'reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments.' " *Bunch v. Thompson*, 949 F.2d 1354, 1363 (4th Cir. 1991) (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066), *cert. denied*, —— U.S. ——, 112 S.Ct. 3056, 120 L.Ed.2d 922 (1992). As noted above, the list of individuals previously approached at one time or another for background information included Turner's mother (his father was deceased), his sister, his aunt, his uncle and his first cousin. It was not unreasonable for Snook to think he (and Deans) had identified and contacted those individuals most likely to possess potentially mitigating information.

Moreover, Turner has not demonstrated that he was prejudiced by Snook's failure to contact other individuals.

He presents affidavits of several unapproached persons who knew about Turner's parents or the conditions of Turner's childhood, but the substance of these affidavits is cumulative of that which Snook already knew; for example, Turner's family was poor and his parents abused him. *See Jones v. Murray*, 947 F.2d 1106, 1113 (4th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992); *Bunch*, 949 F.2d at 1365. And, to the extent Turner generally claims that additional sources should have been investigated (*e.g.*, neighbors, teachers, friends), "he does not advise us of what an adequate investigation would have revealed or what these witnesses might have said, if they had been called to testify." *Bassette*, 915 F.2d at 940-41.

Finally, as for Snook's alleged failure to have a "comprehensive" conversation with Turner about his background, we note that, although Snook testified that he did not recall having a conversation with Turner "starting off with childhood and going all the way through the present," he and Turner "talked a fair amount," discussing "bits and pieces" of Turner's life history "from time to time." JA 755. Indeed, between the time of his original appointment in 1980 and the resentencing proceeding, Snook visited Turner a number of times and spoke with him by phone an average of once per month. They specifically discussed Turner's history while preparing his affidavit for filing in federal court in 1984. Moreover, Woodward had previously interviewed Turner at length. And, Deans (to whom Snook had assigned the task of gathering mitigating evidence) spoke with Turner in person (at Mecklenburg) about three times per year and by telephone about once or twice per month over a period of years. In view of the frequency of direct and indirect client contact, we decline to hold that Snook inadequately interviewed Turner. Nor has Turner shown how he was prejudiced, for he fails to advise us what additional information would have been uncovered by a "comprehensive" interview.

In sum, although Snook "could have perhaps investigated the facts of the case more thoroughly and with more diligence," *Williams v. Dixon*, 961 F.2d 448, 451 (4th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 510, 121 L.Ed.2d 445 (1992), and perhaps could have prepared more thoroughly for the resentencing proceeding, Turner has not shown that Snook's performance fell below an objective standard of reasonableness. In fact, Snook's opening statement to the jury, which described Turner's background, belies that contention. Even Turner's expert witness (Dr. Link) at the state habeas hearing conceded that Snook's opening statement demonstrated familiarity with Turner's background.

b. The 1984 Mecklenburg breakout

More readily disposable is Turner's claim that "[n]o investigation was undertaken of the 1984 breakout incident at Mecklenburg or of the constructive role [he] played in protecting the lives of hostages and other inmates when the situation was most tense." Appellant's Br. at 9. As noted above, Snook was well aware of the facts surrounding, and Turner's role in, the Mecklenburg incident. In fact, in 1985 Snook wrote a letter to then-Governor Robb requesting clemency, wherein he described the gratuitous actions taken by Turner during the escape. Because Snook previously had conducted an investigation of the incident, it was not unreasonable for him to find it unnecessary "to go back and track these people down again. . . ." JA 1246.

2. *Supervision and Preparation of Mental Health Expert*

In his next attack on Snook's pretrial performance, Turner contends that Snook inadequately supervised and prepared Dr. Fisher, a court-appointed mental health expert. He emphasizes that, because of Snook's alleged inattentiveness, Dr. Fisher failed to examine him (Turner) prior to the resentencing proceeding. (Dr. Fisher ex-

amined Turner after the resentencing proceeding was underway.) Consequently, he says, Dr. Fisher was forced to base his diagnosis on trial transcripts and prison and medical records.

To evaluate the reasonableness of Snook's handling of Dr. Fisher, we must back up and recognize why Dr. Fisher was retained. The jury in *Turner I* had recommended the death penalty after finding that both aggravating factors, future dangerousness and vileness, were established. Snook and Woodward, however, did not think that the murder of Smith fit within the vileness factor. They thought that, although the resentencing jury might add vileness as a second factor if it first found future dangerousness, it likely would not find vileness in the absence of future dangerousness. Thus, their strategy was to convince the jury that Turner no longer represented a future danger to society. It was for this reason that Snook sought the appointment of Dr. Fisher.

Dr. Fisher, a clinical forensic psychologist, was an expert in the field of prison conditions, the classification of prisoners, and the adaptability of inmates to prison life. Snook sought a rather narrow opinion from Dr. Fisher—that Turner's violent days were behind him and that he no longer posed a future danger to others. Dr. Fisher referred to this as the "burnout syndrome," whereby one diagnosed as having had an antisocial personality disorder in his early years begins to manifest less antisocial behavior by his mid-thirties (Turner was in his forties).

Significantly, because Snook concluded that Turner's mental health was not a viable issue, Snook never intended to have Dr. Fisher provide a conventional psychological diagnosis or question the validity of any prior psychological diagnoses. Snook wanted him because he was a corrections expert; it was irrelevant to Snook that Dr. Fisher was a psychologist. It thus was not remarkable that "Dr. Fisher did not know any of the details of

[Turner's] crime, much less anything about his psychiatric condition." Appellant's Br. at 25. As for the necessity of a personal examination, Dr. Fisher explained in his affidavit for the state habeas hearing that, because future dangerousness was the focus of the resentencing proceeding, "the existing prisoner and medical files for Mr. Turner, which were ample, became that much more important in my evaluation. Once I carefully reviewed these various materials, one direct meeting with Mr. Turner was all that became necessary." JA 1913.

We conclude that Snook's handling of Dr. Fisher did not fall below an objective standard of reasonableness. In addition, we fail to see how Turner could have been prejudiced by Dr. Fisher's failure to examine him prior to trial. When he examined Turner after the resentencing proceeding was underway, Dr. Fisher discovered nothing new and only confirmed his previously developed conclusions.

3. *Failure to Interview Prosecution Witnesses*

Turner complains that Snook did not interview the Commonwealth's witnesses. " 'A claim of failure to interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel.' " *Eggleston v. United States,* 798 F.2d 374, 376 (9th Cir. 1986) (quoting *United States v. Decoster,* 624 F.2d 196, 209 (D.C.Cir.1976) (en banc)); *see Mulligan v. Kemp,* 771 F.2d 1436, 1442 (11thCir.1985), *cert. denied,* 480 U.S. 911, 107 S.Ct. 1358, 94 L.Ed.2d 529 (1987). Here, from their conversations with the prosecutor, Snook and Woodward were aware of the substance of the witnesses' anticipated testimony. Turner has not identified additional information that would have been revealed had counsel interviewed the Commonwealth's witnesses. *See Eggleston,* 798 F.2d at 376; *Aldrich v. Wainwright,* 777 F.2d 630, 636-37 (11th Cir.1985), *cert. denied,* 479 U.S. 918, 107 S.Ct. 324, 93 L.Ed.2d 297 (1986).

B. *Trial Performance*

In addition to the above attacks on Snook's pretrial preparation, Turner next challenges Snook's trial performance in three respects: (1) he informed prospective jurors that a jury previously had sentenced Turner to death for the murder of Smith, (2) he failed to present any mitigating evidence, and (3) he failed to put on the mitigating evidence described in the opening statement to the jury.

1. *Informing Prospective Jurors of the Prior Sentence*

Because the resentencing jury would be told that its sole function was to determine the penalty for a murder committed nine years earlier and that it could only choose between life imprisonment and death, Snook and Woodward were concerned that jurors would deduce that Turner previously had been sentenced to death for the murder of Smith; *i.e.*, the jurors would figure out that one sentenced to life would not appeal and risk a death sentence.

More importantly, the Commonwealth planned to introduce evidence of Turner's involvement in the highly publicized 1984 escape, and in a 1985 attempted escape, from death row at Mecklenburg. Snook reasoned that, from references to Mecklenburg, death row or the names of the prisoners who escaped, jurors surely would realize that Turner was sentenced to death for the murder of Smith.

Snook and Woodward thus faced a dilemma. They thought their best alternative was to ask the court to preclude the Commonwealth from mentioning Mecklenburg, death row or the prisoners who escaped; for example, "a fictionalized prison in some fictionalized location with fictionalized co-conspirators." JA 828. Indeed, this was the advice of the death penalty experts with whom Snook consulted. Accordingly, in a pretrial hearing, counsel

urged the court to preclude the Commonwealth from making direct or indirect references to Turner's having been on death row:

> MR. WOODWARD: Let me ask a question now. . . . If the defendant elects not to have [the prior sentence] brought to the attention of the jury, then would the Commonwealth be precluded, not that he attempted to escape from Mecklenburg, but would he be precluded from indicating that he attempted to escape from death row?
>
> THE COURT: No, sir. No.
>
> * * * * *
>
> THE COURT: You can't cover it up, Tom.
>
> * * * * *
>
> MR. WOODWARD: . . . but I'm simply asking . . . is not there a way to present it so that death row doesn't come out?
>
> * * * * *
>
> MR. WOODWARD: . . . I'm simply asking more as a matter of inquiry is not there a way . . . without indicating that people are on death row. Can't you go through institutional escape without going through what people are there for?
>
> THE COURT: No, because I don't think you can do it. The Commonwealth is going to try to show the future dangerousness of the individual. You're going to try to show that even though this man has been convicted of capital murder and is being held in Mecklenburg and this, that, and the other. I don't know, it seems to me it makes your case stronger to tell them it was than if you try to hold it away from them.
>
> MR. WOODWARD: Again, I'm simply asking.
>
> THE COURT: There's no way I can see to keep it from them. If he's on death row these guards are

> going to come in and testify and these other people are going to come in and testify . . . .

JA 152-54. The court's position was clear. Snook decided to inform prospective jurors about the prior death sentence.

Turner says this decision amounted to ineffective assistance under *Strickland*. He cites two cases to support his claim, *Arthur v. Bordenkircher*, 715 F.2d 118 (4th Cir. 1983), and *Barker v. Commonwealth*, 230 Va. 370, 337 S.E.2d 729 (1985). In *Arthur*, a pre-*Strickland* case, we found ineffective assistance where counsel drafted and consented to the reading of a jury instruction stating that defendant had been convicted by another jury for the same murder, but was being retried because his earlier conviction had been reversed on procedural grounds. *Arthur*, 715 F.2d at 118-19. In *Barker*, which was not an ineffective assistance case, a prospective juror in a retrial stated during *voir dire* that she was aware defendant had been convicted previously of the crime charged and that she was aware of his prior sentence. *Barker*, 337 S.E.2d at 732. The issue before the Supreme Court of Virginia was whether the trial court erred in refusing to exclude her for cause. *Id.* The court held "that when a venireman knows of an accused's previous conviction of the same offense for which he is being retried, the venireman cannot qualify as a juror in the new trial." *Id.* at 733.

Barker and *Arthur* stand for the general proposition that a defendant's case is damaged by a juror's knowledge that defendant had previously been convicted for the crime charged. We cannot disagree with that proposition in the abstract, and the reasoning of those cases should apply when a juror in a capital sentencing proceeding learns that a prior jury had imposed the death penalty for the crime charged. *Cf. Burger*, 483 U.S. at 788, 107 S.Ct. at 3122-23 (comparing capital sentencing proceeding to a trial). However, we do not read these cases

to mandate a finding of ineffective assistance as a matter of law. *See Strickland*, 466 U.S. at 688-89, 104 S.Ct. at 2065 (noting that no "set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel"). These decisions simply do not address whether it is unreasonable in all circumstances for counsel to inform a prospective juror about a prior verdict. In neither case, for instance, was there any indication that it would be difficult to impanel a jury with no knowledge of the prior verdict. In this case, however, Snook (well aware of the *Barker* decision) reasonably thought it more likely than not that jurors would learn of the prior death sentence.

The question, then, is whether Snook acted unreasonably in the face of his dilemma. He requested that the court declare inadmissible any references by the Commonwealth to death row or the prisoners who escaped from Mecklenburg. The court denied this request. He also considered using *voir dire* to strike for cause those prospective jurors with knowledge of the 1984 Mecklenburg escape, but decided that this would not be practical. This conclusion was justifiable because, although he might have been able to impanel a jury that was unaware of the 1984 escape, the Commonwealth nevertheless could have mentioned death row. Having exhausted these alternatives, Snook decided to inform the venire of the prior death sentence so he could appear forthcoming and, more importantly, so he could guage the reaction of each prospective juror during *voir dire*. He then could strike for cause any prospective jurors who indicated that they would be more inclined to impose the death penalty because of their knowledge of the prior sentence. *Contra Arthur*, 715 F.2d at 119 (jurors, as opposed to *prospective* jurors, were informed of the prior conviction).[23]

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[23] To that end, Turner says that one prospective juror, Samuel Lambert, indicated during *voir dire* that his knowledge of the prior death sentence would affect his judgment. Perhaps Lambert equivocated at first, but after Snook moved to strike him for cause,

In the final analysis, *Strickland* teaches that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064-65. Considering all the circumstances in this case—namely, the anticipated direct or indirect references to death row in conjunction with the risk that jurors might independently deduce the prior death sentence—we hold that counsel did not fall below an objective standard of reasonableness. Rather, this was the type of strategic decision to which we must defer under *Strickland*.[24]

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the resentencing court pursued the matter further. The court asked whether Lambert could base his decision solely on what he heard at the resentencing proceeding and not on the prior death sentence. Lambert answered in the affirmative. The court, having observed Lambert, was satisfied with his response. We agree with the district court below that there is nothing in the record that could have us doubt the resentencing court's finding of impartiality. *See Turner*, 812 F.Supp. at 1435; *see also Turner*, 364 S.E.2d at 486 (Supreme Court of Virginia, on direct review in *Turner II*, finding no abuse of discretion.

[24] Turner says that counsel were unreasonable for ignoring the advice of experts from the NAACP Legal Defense Fund and the Southern Prisoners Defense Committee. Those experts were of the opinion that a jury never should be informed that a defendant had previously been sentenced to death for the same crime. Though perhaps a prudent rule in theory, such a categorical rule was of no help here in light of the difficulties counsel would face in attempting to keep this evidence from the jury. In fact, counsel followed the only practical suggestion offered by these experts when they moved for redaction of damaging references from the Commonwealth's evidence, but the trial court was not amenable to this approach.

Because Turner accords weight to the views of death penalty "experts," it is perhaps worth noting here that Snook, who lectured and wrote about death penalty defense, was no novice himself. The state habeas court found that Snook was "one of the experts in the field of capital cases," had "handled more death penalty litigation than any other private attorney in Virginia," and was "one of the most experienced criminal lawyers in Virginia." JA 1486. Furthermore, the court found that Woodward

2. *Failure to Present Mitigating Evidence*

The Commonwealth finished its case in chief on Friday, January 9, 1987. On Monday, January 12, defense counsel rested without putting on any mitigating evidence. Turner claims this decision was both unreasonable and prejudicial under *Strickland*. As set out below, we conclude that counsel made a sound tactical decision not to present any mitigating evidence, a decision which we should avoid second guessing.

The Commonwealth had in its possession a substantial amount of aggravating evidence. Yet, the prosecutor, Grizzard, put on a rather mild case in chief. He first presented the facts of the Smith murder. But instead of putting on live eyewitness testimony, transcripts from the *Turner I* sentencing proceeding were read verbatim to the jury. Snook thought the jury appeared bored by this approach.

Next, Grizzard presented Turner's criminal history. But, instead of fleshing out the aggravating details of his numerous prior crimes, an official from the Virginia Department of Corrections simply stated each offense, and the date, location and sentence for each offense.

Finally, Grizzard presented evidence relating to the 1984 breakout and the 1985 attempted escape from Mecklenburg. With regard to the 1984 escape, instead of calling eyewitnesses to testify about Turner's role and actions, the Commonwealth called a police officer (Officer Mills) to read Turner's account of the incident. (Mills had interviewed Turner in the presence of Snook shortly after the incident.)

In short, despite the fact that the Commonwealth had a substantial amount of damaging evidence relating to

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"was undoubtedly one of the most effective criminal lawyers in Eastern Virginia." *Id.* He had been practicing criminal law for nearly two decades, "predominantly representing criminal defendants from the same or similar backgrounds as Turner." *Id.*

future dangerousness, by its own account it withheld from its case in chief eighty percent of that evidence, including some of the most damaging information. For example, Grizzard was prepared to call Lorenzo Artis, the victim of Turner's 1970 malicious wounding offense, and police officers involved with that incident. Artis would have described how Turner shot him five times as he (Artis) left a restaurant; a police officer (Chief Britt) would have presented Turner's reaction when arrested: "[Y]ou-all after me because I shot that nigger? . . . I hope he dies." JA 695.

Snook and Woodward were well aware of the Commonwealth's evidence, and they knew that Grizzard's strategy was to dump damaging evidence during cross-examination and rebuttal. (In fact, Grizzard effectively used the same strategy in *Turner I*, where the jury found future dangerousness in addition to vileness.) Nevertheless, Snook and Woodward were surprised at how much Grizzard withheld from his case in chief; they thought he made a tactical error, and they thought Turner could not be in a much better position at that point. Because Snook believed "there was more evidence suggestive of [Turner's] bad character than there was suggestive of his good character," JA 797, and that it might do more harm than good to open the door for more aggravating evidence, they immediately considered not putting on any mitigating evidence.

Snook first decided not to call Mr. Fisher. Dr. Fisher's function, after all, was to rebut the Commonwealth's future dangerousness evidence, much of which had not been presented in its case in chief. And, the Commonwealth's principal strategy was to wait for Dr. Fisher's testimony to open the door for significant aggravating evidence during cross-examination and rebuttal. For instance, Grizzard would have called Dr. Lee, a clinical psychologist, to testify "that there was a substantial probability that Mr. Turner would commit future criminal offenses of a violent nature. And of the degree that this would prob-

ably put society in danger." JA 1133. A psychiatrist (Dr. Dimitris) would have confirmed this. Thus, calling Dr. Fisher could have done more harm than good, and Snook's decision not to call Dr. Fisher clearly was the type of tactical decision to which he must defer under *Strickland*. *See Fitzgerald v. Thompson*, 943 F.2d 463, 470 (4th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1219, 117 L.Ed.2d 456 (1992); *Bunch*, 949 F.2d at 1364 (had counsel called their psychiatrist, harmful evidence would have emerged on cross-examination). In deed, Turner's expert (Dr. Link) at the state habeas hearing conceded it "was a good decision not to use [Dr. Fisher]." JA 1096.

Likewise, although a closer call, it was a tactical decision not to present evidence relating to Turner's gratuitous actions during the 1984 Mecklenburg escape. Here, there was more concern with cross-examination than rebuttal. For example, although witnesses could have testified that Turner helped some of the hostages, they also would have reaffirmed the aggravating circumstances surrounding Turner's role in the incident. Indeed, one of Turner's potential witnesses (Officer Fitts) could have revealed on cross-examination that Turner stuck a knife in his back and told him to "get down or die." JA 2337, 2335.

The best mitigating evidence here was a statement allegedly made by Turner to other inmates who were threatening to kill some hostages: "You're going to have to go thru [sic] me first. If you're going to kill somebody, you will have to kill me first." JA 2364. Yet, by withholding this statement, Snook precluded the Commonwealth from recycling (on cross-examination) aggravating evidence about Turner's role in the escape: Turner helped plan and execute the escape of dangerous death row inmates, he provided inmates with weapons, he took hostages, etc. Although the jury had already heard this aggravating evidence, it had heard it only once—and only from Turner's perspective (from Officer Mills' interview after the incident). We cannot fault counsel for

wanting to leave it at that. Moreover, Snook thought the Commonwealth's reliance on Turner's statement made him appear trustworthy. (We note that Turner's account of the incident, which was read to the jury, did include some mitigating facts: He wanted to back out of the plan, he urged the inmates not to harm a correctional officer, he tried to give a knife to Lt. Hawkins, and he checked on Nurse Barksdale, who had been disrobed and placed in his cell.)

Having decided not to call Dr. Fisher or Mecklenburg witnesses, Snook was left with background and character evidence, which he thought to be rather marginal. As for the background evidence in particular, Snook thought that juries were not very receptive to evidence of a deprived upbringing without a "solid mental health issue." JA 836-37. And, Snook and Woodward thought it might offend some members of the rural Virginia jury if they emphasized Turner's deprived upbringing or suggested that one might commit murder as a result of it. *See Card v. Dugger,* 911 F.2d 1494, 1511 (11th Cir.1990) ("emphasizing a client's deprived childhood does not have a very beneficial impact on a northwest Florida jury, given the fact that many jurors have had difficult lives, but have not turned to criminal conduct"). Indeed, during his opening statement Snook had noticed that some jurors appeared unreceptive when he referred to Turner's deprived upbringing.

Of more concern was the permissible scope of rebuttal were Snook to put on background or character evidence. Snook did not believe this evidence was so overwhelming that it was worth opening the door for extensive aggravating evidence. Accordingly, Snook and Woodward returned to court on Monday, January 12, 1987, and asked for a ruling on the permissible scope of rebuttal evidence. The court declined to rule on the motion until it heard the specific evidence at trial but clearly indicated that there would be few, if any, restrictions on the scope

of rebuttal. *See, e.g.*, JA 424-25 (the court warned, "I think the Commonwealth has a right to come back and show the bad, if you show the good"); JA 426 (the court advised, "[b]ecause this whole hearing is based on . . . what kind of man is Willie Lloyd Turner . . . you've got to take the bitter with the sweet and vice versa"); *id.* (court saying the Commonwealth can "come in and show well, [Turner] was a pretty bad guy"). Snook and Woodward immediately told the court that, based on the court's statements, they would rest their case without putting on any evidence.

In sum, Snook and Woodward thought Turner had a chance for a life sentence if the Commonwealth failed to meet its burden of establishing that Turner was a future danger to society. Snook thought (and argued to the jury during closing argument) that the Commonwealth did not carry that burden in its case in chief. Moreover, he was concerned that the presentation of mitigating evidence would provoke damaging cross-examination and rebuttal. As we have observed:

> Trial counsel is too frequently placed in a no-win situation with respect to possible mitigating evidence at the sentencing phase of a capital case. The failure to put on such evidence, or the presentation of evidence which then backfires, may equally expose counsel to collateral charges of ineffectiveness. The best course for a federal habeas court is to credit plausible strategic judgments in the trial of a state case.

Bunch, 949 F.2d at 1364 (failure to put on evidence of traumatic childhood and psychiatric testimony). In view of all the circumstances surrounding Snook's decision to forego a mitigation case, Turner has not overcome the presumption that the decision constituted "sound trial strategy," *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. *See Burger*, 483 U.S. at 795, 107 S.Ct. at 3126; *Strickland*, 466 U.S. at 700, 104 S.Ct. at 2071; *Bunch*, 949

F.2d at 1364; *Whitley v. Bair*, 802 F.2d 1487, 1496 (4th Cir.1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987); *McAleese v. Mazurkiewicz*, 1 F.3d 159, 167 (3d Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 645, 126 L.Ed.2d 603 (1993); *Prejean v. Smith*, 889 F.2d 1391, 1398 (5th Cir.1989), *cert. denied*, 494 U.S. 1090, 110 S.Ct. 1836, 108 L.Ed.2d 964 (1990); *Mitchell v. Kemp*, 762 F.2d 886, 890 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026, 107 S.Ct. 3248, 97 L.Ed.2d 774 (1987). Having held that counsel did not fall below an objective standard of reasonableness, we need not explore whether Turner was prejudiced by the failure to introduce mitigating evidence.[25]

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[25] The district court below apparently concluded that Turner was not prejudiced by Snook's failure to present the Mecklenburg evidence, because this evidence was relevant only to the issue of future dangerousness (which the jury did not find), not vileness. *See Turner*, 812 F.Supp. at 1429-30. The suggestion here is that a petitioner cannot be prejudiced when counsel withholds mitigating evidence that lacks a direct substantive relationship to the aggravating factor(s) found by the sentencer. The Supreme Court, however, has made clear that a sentencer may not be precluded from considering, and therefore basing a life sentence on, any mitigating evidence—even when there is no direct relationship between that evidence and the established aggravating factor(s). *See Hitchcock v. Dugger*, 481 U.S. 393, 398-99, 107 S.Ct. 1821, 1824-25, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4-5, 106 S.Ct. 1669, 1670-71, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114-16, 102 S.Ct. 869, 877-78, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978) (plurality opinion). It follows that a petitioner may be prejudiced when counsel fails to present "unrelated" mitigating evidence, so long as there is a reasonable probability that, had the sentencer considered the mitigating evidence, it "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069.

3. *Failure to Put On Mitigating Evidence Described in the Opening Statement*

At the outset of the sentencing proceeding, Snook planned to introduce mitigating evidence. Accordingly, in his opening statement he told the jury that he would produce certain mitigating evidence (testimony and other evidence). As discussed above, he rested without putting on that evidence. Turner says Snook's failure to present the evidence described in the opening statement, in and of itself, was ineffective assistance. We disagree.

Turner relies principally on a First Circuit decision, *Anderson v. Butler,* 858 F.2d 16 (1st Cir.1988). In *Anderson,* defense counsel, in his opening at the close of the state's case, told the jury that he would call a psychiatrist and a psychologist. *Id.* at 17. The next day counsel rested without calling the doctors. *Id.* The court, over then-Judge Breyer's dissent, emphasized that "little is more damaging than to fail to produce important evidence that had been promised in an opening" because "the jurors would believe, in the absence of some other explanation, . . . that the [witnesses] were unwilling, viz., unable, to live up to their billing." *Id.* The court's opinion suggests that counsel renders ineffective assistance as a matter of law when evidence promised in an opening statement is not delivered at trial, unless perhaps counsel completely abandons a defense. *See id.* at 18-19. Turner asks that we adopt such a rule.[26]

However, in a recent case not cited by Turner, *United States v. McGill,* 11 F.3d 223 (1st Cir.1983), the First

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[26] Turner also refers us to a Seventh Circuit decision, *Harris v. Reed,* 894 F.2d 871 (7th Cir. 1990), which cited *Anderson.* But *Harris* did not involve a distinct challenge to counsel's failure to put on evidence promised in an opening statement. Rather, defendant attacked generally counsel's failure to put on mitigating evidence, evidence the court thought "would have greatly aided his case." *See id.* at 879. The fact that this evidence was described in the opening statement, though a factor, was not determinative. *See id.*

Circuit appeared to read narrowly its *Anderson* decision. The court said: "Although a failure to produce a promised witness *may under some circumstances* be deemed ineffective assistance, *see, e.g., Anderson v. Butler,* 858 F.2d 16, 19 (1st Cir.1988), the determination of inefficacy is *necessarily fact based.* '[N]o particular set of rules can be established to define effective assistance. . . .'" *Id.* at 227 (emphasis added) (quoting *United States v. Natanel,* 938 F.2d 302, 310 (1st Cir.1991), *cert. denied,* —— U.S. ——, 112 S.Ct. 986, 117 L.Ed.2d 148 (1992)).

We agree with the reasoning of the more recent First Circuit decision and with Judge Breyer's dissenting opinion in *Anderson,* both of which adhere to *Strickland*'s express warning that:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have have in making tactical decisions.

Strickland, 466 U.S. at 688-89, 104 S.Ct. at 2065. *See also McAleese,* 1 F.3d at 167-68 (in *dicta,* the Third Circuit noted that even if the opening statement contained an implicit promise to produce certain evidence, counsel's "later decision not to do so is not necessarily ineffective"); *Johnson v. Johnson,* 531 F.2d 169, 177 n. 19 (3d Cir.), *cert. denied,* 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976). In our view, assuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is "virtually unchallengeable," *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066. Were we to adopt Turner's position, we would effectively be instructing defense counsel to continue to

pursue a trial strategy even after they conclude that the original strategy was mistaken or that the client may be better served by a different strategy. *See Anderson,* 858 F.2d at 20 (Breyer, J., dissenting) ("Consider the pressure that such a view places upon a criminal defense attorney (once having mentioned a witness) to call that witness, *even if doing so will hurt his client.*"). In addition, we would discourage counsel from making effective use of opening statements, thereby precipitating ineffective assistance challenges to the quality of opening statements.

In the instant case, Snook intended at the outset to present the evidence described in the opening statement. He changed his trial strategy because he thought the Commonwealth rested prematurely and because the court indicated that the scope of rebuttal would be quite broad. We conclude that his strategic decision to withhold evidence promised in the opening statement was not unreasonable. Nor was it unreasonable for him to mention mitigating evidence in his opening statement. This, again, was a strategic decision; had Snook not described mitigating evidence in the opening statement, we suspect that Turner would have challenged that omission. Finally, Turner's allegation that the opening statement was made without the benefit of adequate pretrial preparation must be rejected, for we have concluded above that Snook's pretrial preparation was adequate.

VI

In conclusion, we hold that the Virginia courts applied the statutory vileness factor in a constitutionally adequate manner and that counsel did not render ineffective assistance. We therefore affirm the district court's denial of Turner's § 2254 petition for habeas corpus.

AFFIRMED.

LUTTIG, Circuit Judge, concurring in the judgment:

Treating the express language of United States Supreme Court opinions as mere exhortation, rather than as binding interpretation of law, the majority fundamentally alters for this circuit the Supreme Court's "new rule" jurisprudence governing federal *habeas* review. In its stead, the majority substitutes a doctrine that requires federal courts to review on the merits every claim "predicated on" a prior precedent, whether or not the relief sought by the petitioner is dictated by that precedent. As its own opinion reveals, the majority thereby requires full merits review even of claims that are wholly without merit under precedent existing at the time a petitioner's conviction became final. The majority thus eviscerates the Supreme Court's decisions in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and succeeding cases, and requires the kind of endless, intrusive review of state court judgments by federal *habeas* courts that it was the express purpose of *Teague* to arrest.

In adopting its new standard, the majority all but ignores the Supreme Court's recent decision in *Graham v. Collins,* —— U.S. ——, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), which stands as directly contrary authority to the majority's new pronouncement, consigning *Graham* to a line of Supreme Court cases that, it informs us, has only "added more words," but no guidance, to the "new rule" inquiry. *Ante* at 879. If this were not enough, the majority mischaracterizes at least four other Supreme Court cases, *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *Stringer v. Black,* —— U.S. ——, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and *Shell v. Mississippi,* 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990), and overlooks a fifth, *Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), that stand between it and the new standard it announces. Because of the

majority's startling disregard for Supreme Court authority, and because of the enormous consequences for *habeas* review wrought by this disregard, I do not join the court's opinion.

I.

A.

The Supreme Court has stated repeatedly that the rule sought by a *habeas* petitioner is "new," and thus consideration of the underlying claim barred, unless reasonable jurists considering the petitioner's claim at the time his conviction became final " 'would have felt *compelled by existing precedent' to rule in his favor.*" *Graham,* —— U.S. at ——, 113 S.Ct. at 898 (emphasis added) (quoting *Saffle v. Parks,* 494 U.S. 484, 488, 110 S.Ct. 1257, 1260, 108 L.Ed.2d 415 (1990)). With similar frequency and clarity, the Court has declared, as a corollary, that it is *in*sufficient that prior decisions "inform, or even control or govern, the analysis of" a petitioner's claim. *Parks,* 494 U.S. at 491, 110 S.Ct. at 1262. *See also Sawyer v. Smith,* 497 U.S. 227, 236, 110 S.Ct. 2822, 2828, 111 L.Ed.2d 193 (1990) (quoting *Parks* with approval); *Butler v. McKellar,* 494 U.S. 407, 415, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347 (1990) (decision within the "logical compass" of an earlier decision may nonetheless announce new rule).

Without even a discussion of this established standard, and through the artifice of substituting terms of different meaning for the terms of the Supreme Court standard, the majority adopts for this circuit a standard that compels federal *habeas* review if a petitioner's claim is "predicated on" prior decisions, or if prior decisions "dictate" the petitioner's "challenge." *Ante* at 883 (rejecting Commonwealth's *Teague* argument because it "focuses on the most specific conclusion or holding Turner hopes we reach: that the limiting definition used in his case was constitutionally insufficient"). Thus, holding that Turner

does not seek a new rule within the meaning of *Teague* because "Turner's challenge is predicated on *Godfrey* [*v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)]," *ante* at 882, and *"Godfrey . . .* dictates Turner's challenge," *id.* at 881,[1] the majority undertakes full merits review of a claim as to which it concedes Turner is unquestionably not entitled to relief.

Rejecting the majority's standard, the Supreme Court has stated time and again that prior precedent must dictate the relief sought by the *habeas* petitioner in order to avoid *Teague's* bar to federal review. *See, e.g., Penry*, 492 U.S. at 313, 109 S.Ct. at 2944 ("[W]e must determine, as a threshold matter, *whether granting* [*Penry*] *the relief he seeks* would create a 'new rule.' " (emphasis added) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070)); *Graham*, —— U.S. at ——, 113 S.Ct. at 900 ("We cannot say that reasonable jurists considering petitioner's claim in 1984 would have felt that these cases *'dictated' vacatur of petitioner's death sentence.*" (emphasis added) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1010)); *Graham*, —— U.S. at ——, 113 S.Ct. at 902 ("This distinction leads us to conclude that neither *Penry* nor any of its predecessors *'dictates' the relief Graham seeks* within the meaning required by *Teague.*" (emphasis added)); *id.* —— U.S. at ——, 113 S.Ct. at 903 ("We cannot say that all reasonable jurists would have deemed themselves *compelled to accept Graham's claim* in 1984." (emphasis added)); *Stringer*, —— U.S. at ——, 112 S.Ct. at 1135 (*Teague* inquiry asks *"whether granting the relief sought* [*by the petitioner*] would create

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[1] *See also ante* at 882 ("Because *Stringer* expressly held that *Godfrey* dictated Cartwright's claim and thus Cartwright did not seek a new rule for purposes of *Teague*, we are compelled to reach the same conclusion here."); *id.* at 881-82 ("The Tenth Circuit's decision [in *Cartwright*] was predicated on *Godfrey.*"); *id.* at 882-83 n. 9 ("Several [later] Supreme Court decisions . . . seemingly take for granted that challenges to a state's limiting construction are predicated on *Godfrey* and *Cartwright.*").

a new rule because the prior decision is applied in a novel setting, thereby extending the precedent." (emphasis added)); *id.* ("[A] case decided after a petitioner's conviction and sentence became final may not be the predicate *for federal habeas corpus relief* unless the decision was dictated by precedent . . . ." (emphasis added)); *Johnson v. Texas,* —— U.S. ——, ——, 113 S.Ct. 2658, 2668, 125 L.Ed.2d 290 (1993) ("In rejecting the contention that *Penry* dictated a *ruling in the defendant's favor* [in *Graham*], we stated that . . . ." (emphasis added)); *id.* ("We also did not accept the view that the *Lockett* [*v. State of Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)] and *Eddings*[*v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)] line of cases, upon which *Penry* rested, *compelled a holding for the defendant* in *Graham* . . . ." (emphasis added)); *id.* ("We concluded that, even with the benefit of the subsequent *Penry* decision, reasonable jurists at the time of Graham's sentencing 'would [not] have deemed themselves *compelled to accept Graham's claim.*' " (emphasis added) (quoting *Graham,* —— U.S. at ——, 113 S.Ct. at 903)); *Johnson,* —— U.S. at ——, 113 S.Ct. at 2668 ("Thus, we held that *a ruling in favor of Graham* would have required the impermissible application of a new rule under *Teague.*" (emphasis added)); *id.* at ——, 113 S.Ct. at 2671 ("To rule in petitioner's favor . . . ."); *Caspari v. Bohlen,* —— U.S. ——, ——, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994) ("The nonretroactivity principle *prevents a federal court from granting habeas corpus relief* to a state prisoner based on a rule announced after his conviction and sentence became final." (emphasis added)).[2]

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[2] The holding in *Bohlen,* which is the Court's most recent *Teague* decision, is fully consistent with the other cases in the *Teague* line of authority. The majority states that in *Bohlen,* "the Court focused on the more general rule sought—that the Double Jeopardy Clause applies to a noncapital sentencing proceeding—as opposed to the specific holding sought by the petitioner, that his sentence

Indeed, even the dissenting Justices in the continuing debate over the contours of the "new rule" doctrine fully accept that the extant precedent must dictate a ruling in the petitioner's favor. Justice Souter, for example, who authored the dissent in *Graham*, could not have been clearer as to this requirement of the "new rule" doctrine when he wrote in *Wright v. West*, —— U.S. ——, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992), that "[t]o survive *Teague*, [a rule] must be 'old' enough to have predated the finality of the prisoner's conviction, *and specific enough to dictate the rule on which the conviction may be held to be unlawful.*" *Id.* at ——, 112 S.Ct. at 2501 (Souter, J., concurring) (emphasis added); *see also id.* at ——, 112 S.Ct. at 2502 (Souter, J., concurring) ("[I]n light of authority extant when his conviction became final, *its unlawfulness must be apparent.*" (emphasis added)). Justice Brennan also acknowledged that this is the standard governing federal *habeas* review. As he stated in *Butler*, the Court in *Teague* "declared that a federal court entertaining a state prisioner's habeas petition generally may not reach the merits of the legal claim unless the court determines, as a threshold matter, that a *favorable ruling on the claim* would flow from the application of [pre-existing] legal standards." *Butler*, 494 U.S. at 417, 110 S.Ct. at 1218-19 (Brennan, J., dissenting) (emphasis added); *see also id.* at 417-18, 110 S.Ct. at 1219 (Brennan, J., dissenting) ("Put another way, a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge *was so*

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violated the Double Jeopardy Clause." *Ante* at 883. This distinction is a false one. Granting Bohlen's proposed relief—declaring his sentence unconstitutional—would have required a holding that the Double Jeopardy Clause applied with the same force in noncapital, as in capital, sentencing. The Court held that reasonable jurists at the time Bohlen's conviction became final would not have believed such a holding was dictated by precedent. Hence, they would not have been compelled to rule in Bohlen's favor and declare his sentence unconstitutional. *See Bohlen*, —— U.S. at ——-——, 114 S.Ct. at 955-56.

clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist." (emphasis added)); *West,* —— U.S. at ——, 112 S.Ct. at 2490 ("[A] federal habeas court 'must defer to the state court's decision rejecting the claim *unless that decision is patently unreasonable.*'" (emphasis added) (quoting *Butler,* 494 U.S. at 422, 110 S.Ct. at 1221 (Brennan, J., dissenting))).

The majority appears to believe that those Justices who have either dissented from or concurred separately in the Supreme Court's *Teague* cases disagree with the Court's majority that prior precedent must dictate the relief sought by the petitioner. This misunderstanding seems to stem from the majority's failure to appreciate the nuance of the position taken by the dissent in *Graham.* See discussion *infra* at 880-82. In *Graham,* the dissent does state that "application of an existing precedent in a new factual setting will not amount to announcing a new rule." *Graham,* —— U.S. at ——, 113 S.Ct. at 918 (Souter, J., dissenting). However, the dissent's view that Graham sought only the application of *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), was not based on the conclusion that resolution of the case, *whether for or against Graham,* would be by resort to the rule in *Jurek,* but rather on the twin conclusions that Graham's evidence was not materially different from Penry's, *see Graham,* —— U.S. at ——, 113 S.Ct. at 920 (Souter, J., dissenting), and that both types of evidence received essentially the same degree of consideration in mitigation, *see id.* ("Graham's claim that his evidence could receive only partial consideration is just as much a claim for application of the pre-existing rule demanding the opportunity for full effect as was Penry's claim that his retardation could be given no effect under the second Texas special issue."). It was for these reasons that the dissenters concluded *Graham* was indistinguishable from *Penry.* And "from [their] conclusion that the rule from which the petitioner sought to benefit in

Penry was not 'new,'" because *Jurek, Lockett,* and *Eddings* dictated the relief Penry sought, "it necessarily follow[ed] that the rule petitioner Graham [sought] [was] not new either." *Id. See also West,* —— U.S. at ——, 112 S.Ct. at 2497 (O'Connor, J., concurring) ("If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable."). The dissenters, in other words, disagreed with the majority only over the question of the generality with which a pre-existing rule should be described.

In no *Teague* opinion—majority, concurring, or dissenting—has any Justice intimated, much less stated, that he or she might adopt the standard employed by the majority today.

The standard adopted and consistently applied by the Court does not, contrary to the majority's belief, conflate the *Teague* inquiry and the decision on the merits. *See ante* at 887-88 n. 16. It is only if one does not accept the Court's standard that prior precedent must dictate the relief sought (as the majority does not) that the *Teague* inquiry appears circular and thus to merge into a disposition on the merits. If one follows the standard announced by the Court, it could not be clearer that, while the *Teague* inquiry, like a disposition on the merits, requires a canvassing of the applicable legal authority and a consideration of the facts in light of that authority, it is an inquiry quite different from a disposition on the merits. Under *Teague,* the ultimate question is solely whether the state court judgment was reasonable under authority existing at the time the defendant's conviction became final (*viz,* whether precedent dictated the relief sought), not whether the judgment was in fact correct as a matter of law. Thus, for example, one would not have to decide on the merits whether a limiting construc-

tion was constitutionally sufficient in order to know whether the claim that the instruction was unconstitutional was *Teague*-barred. *Compare ante* 887-88 n. 16. One would only have to decide whether precedent *dictated* such a holding. In short, the majority fails to appreciate that to determine what reasonable jurists would have believed precedent dictated is simply not to determine the merits of the claim.

B.

The requirement that prior precedent dictate a holding for the defendant was fashioned so as to "validate[] reasonable, good-faith interpretations of existing precedents made by state courts," *Butler*, 494 U.S. at 414, 110 S.Ct. at 1217, the Court having determined that the mere threat of reversal of convictions obtained in clear contradiction of established law would adequately protect federal rights. The requirement serves this purpose by ensuring that federal courts on *habeas* do not second-guess reasonable state court judgments, whether by reversal *or, as here, by affirmance wherein state court reasoning is critically examined and finely calibrated.* Not only will the standard adopted by the majority here not serve this and the other purposes underlying the "new rule" doctrine, it will affirmatively disserve these purposes in ways that would be hard to overstate.

Applying the majority's first locution of whether prior precedent "dictates the challenge," even against the petitioner, alone will result in an inestimable number of cases in which federal courts will undertake full merits review of reasonable, and in many instances unassailable, state court judgments. For in many cases that are not currently reviewable on federal *habeas*, the state court's judgment, as the one we review in this case, will have been dictated by existing precedent. Any cases not subject to review under the "dictates the challenge" locution will undoubtedly be subject to review under the majority's alternative formulation that the "new rule" doctrine does

not bar consideration of any claim "predicated on" prior caselaw. This formulation will render reviewable on *habeas* essentially every claim, for almost every *habeas* petitioner necessarily "predicates" his claim on prior caselaw. *Cf. Penry,* 492 U.S. at 353, 109 S.Ct. at 2965 (Scalia, J., dissenting) ("In a system based on precedent and *stare decisis,* it is the tradition to find each decision 'inherent' in earlier cases . . . .").

These consequences of the majority's decision underscore the magnitude of its error. The very purpose of *Teague* was to halt federal *habeas* review even of state court interpretations of federal law that ultimately prove *incorrect,* provided they are reasonable. Yet under the majority's reasoning, federal courts will be reviewing and deciding on the merits countless state court judgments that are not only reasonable but, as here, *indisputably correct.*

The standard adopted by the majority thus will completely frustrate the principles of finality, comity toward state judicial tribunals, *see Teague,* 489 U.S. at 310, 109 S.Ct. at 1075 ("[s]tate courts are understandably frustrated" when federal *habeas* courts reverse their reasonable rulings on federal law) (quoting *Engle v. Isaac,* 456 U.S. 107, 128 n. 33, 102 S.Ct. 1558, 1572 n. 33, 71 L.Ed.2d 783 (1982)), and respect for state prosecutorial authorities, *see Teague,* 489 U.S. at 310, 109 S.Ct. at 1075 (federal review should not require states "to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards"), that prompted adoption of *Teague*'s "new rule" doctrine in the first place.

II.

If any of the Supreme Court's *Teague* cases had even hinted at the standard applied by the majority, its action would not be so disconcerting. However, in order to forge its new *Teague* standard, the majority must ignore the

Supreme Court precedent that proves its error and misread or overlook at least five other Supreme Court precedents that foreclose or otherwise cast doubt on the standard it adopts.

A.

Most disturbingly, the majority simply refuses to directly confront *Graham*, a case that confirms that the majority has misstated and misapplied the Court's "new rule" doctrine, and reveals that it has seriously misread *Penry*, upon which it extensively relies.

In *Graham*, the petitioner sought *vacatur* of his death sentence on the grounds that Texas' "special issues" procedure for imposing the death penalty precluded his jury from giving mitigating effect to his evidence of youth, deprived upbringing, and redeeming character traits, in contravention of the Supreme Court's decisions in *Jurek*, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.E.2d 1 (1982). Specifically, Graham contended that Texas' capital sentencing scheme, which required juries to impose the death penalty if they answered three "special issues" questions in the affirmative, did not permit the jury to give mitigating effect to his evidence.[3] Graham's unsuccessful *Teague* argument before the Supreme Court sounded much like Turner's argument before us, in that Graham claimed that he was simply seeking an "application" of prior law:

> He asks only what was granted in *Penry*; that the promise of *Jurek* be redeemed, and that the Court reaffirm the authority—from *Woodson*[*v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)] to *Lockett* and *Eddings*—on which *Penry* rests.

[3] The second of these questions allowed for consideration of mitigating evidence. That question asked "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim.Proc.Ann. art. 37.071(b) (Vernon 1981).

Reply Brief of Petitioner at II.A., *Graham v. Collins*, —— U.S. ——, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993). *Cf. ante* at 886 ("*Godfrey* upheld the statutory vileness factor on the basis of 'assurances' that the sentencer's discretion would be channelled by constitutionally sufficient standards. Turner 'argues that those assurances were not fulfilled . . . .' ").

Consistent with its prior cases, the *Graham* Court stated the governing inquiry as whether reasonable jurists would have believed themselves compelled by the prior precedent to rule in petitioner's favor:

> Thus, unless reasonable jurists hearing petitioner's claim at the time his conviction became final *"would have felt compelled by existing precedent" to rule in his favor,* we are barred from doing so now.

Graham, —— U.S. at ——, 113 S.Ct. at 898 (emphasis added) (quoting *Parks,* 494 U.S. at 488, 110 S.Ct. at 1260). Then, after reciting the "pre-existing normative rule" of *Jurek, Lockett,* and *Eddings,* that it was unconstitutional for a state to foreclose completely a jury's consideration of mitigating evidence, the Court concluded that reasonable jurists considering Graham's claim at the time his conviction became final would not have felt that these cases "'*dictated*' vacatur of petitioner's death sentence." *Graham,* —— U.S. at ——, 113 S.Ct. at 900 (quoting *Teague,* 489 U.S. at 301, 109 S.Ct. at 1070). "To the contrary," the Court reasoned,

> to most readers at least, these cases reasonably would have been read as upholding the constitutional *validity* of Texas' capital sentencing scheme with respect to mitigating evidence and otherwise . . . [because] it permitted petitioner to place before the jury whatever mitigating evidence he could show, including his age.

Graham, —— U.S. at ——, 113 S.Ct. at 900. Thus, because the caselaw existing when Graham's conviction

became final would reasonably have been understood as dictating not the relief Graham sought, but rather an affirmance of his conviction and sentence, the Court held that Graham sought a new rule and therefore that his claim was *Teague*-barred. *Compare ante* at 886 ("In sum, when we apply an extant normative rule to a new set of facts . . . generally we do *not* announce a new constitutional rule of criminal procedure for purposes of *Teague*." (emphasis added)).

Graham thus confirms that the Supreme Court has given full effect both to its unambiguous directive that a claim is barred unless a holding *in the defendant's favor* would be dictated by precedent existing at the time the defendant's conviction became final, and to the corollary that a claim merely "predicated on" or governed by prior precedent is not saved from the sweep of the "new rule" doctrine.

If there were any question that this is the standard applied by the Supreme Court, it is laid to rest by the *Graham* Court's discussion, and ultimate distinction, of *Penry*. *See Johnson*, —— U.S. at ——-——, 113 S.Ct. at 2668-69 (noting differences between *Graham* and *Penry*). Penry, like Graham, challenged the application of Texas' then-existing death penalty statute. Penry, as did Graham, sought *vacatur* of his death sentence on the grounds that Texas' "special issues" death penalty procedure precluded his jury from giving full effect to his mitigating evidence, in violation of *Jurek*, *Lockett*, and *Eddings*. At a *general* level, Penry's and Graham's arguments were virtually identical; they differed only with respect to the specific type of mitigating evidence, the consideration of which each claimed had been foreclosed from juror consideration. In Penry's case, the evidence was of his organic brain damage and history of childhood abuse; in Graham's, the evidence was of his youth, deprived upbringing, and redeeming character traits.

In determining that *Penry* (as well as *Jurek, Lockett,* and *Eddings*) did not "dictate" granting Graham's requested relief, the Court distinguished *Penry* (as well as *Lockett* and *Eddings*) as cases in which "the constitutional defect lay in the fact that relevant mitigating evidence was placed *beyond* the effective reach of the sentencer." *Graham,* —— U.S. at ——, 113 S.Ct. at 902 (emphasis added); *see also Johnson,* —— U.S. at ——-——, 113 S.Ct. at 2668-69 (expressly noting *Graham*'s distinction of *Penry* on the ground that Penry's mitigating evidence had not been given effect at his sentencing, whereas Graham's had; distinguishing Johnson's case from Penry's on same ground). *Unlike* Graham's (and Jurek's) evidence, the Court explained, Penry's evidence—that he suffered from organic brain damage and that he had been physically abused as a child—could be given only "aggravating" effect in the context of the Texas scheme. *Graham,* —— U.S. at ——, 113 S.Ct. at 901.

On the basis of this distinction, *i.e.,* that Penry's jury was not, but Graham's was, permitted to consider mitigating evidence as such, the Court concluded that although granting Penry's relief did not announce a rule new from that in *Jurek,* granting Graham's requested relief would. *See id.* at ——, 113 S.Ct. at 902 ("This distinction leads us to conclude that neither *Penry* nor any of its predecessors *'dictates' the relief Graham seeks* within the meaning required by *Teague.*" (emphasis added)); *see also Johnson,* —— U.S. at ——-——, 113 S.Ct. at 2668-69. And, in a passage that reconfirms that the focus of the *Teague* inquiry is on the relief sought by the petitioner, the Court observed,

> even if *Penry* reasonably could be read *to suggest* that Graham's mitigating evidence was not adequately considered under the former Texas procedures, that is not the relevant inquiry under *Teague.* Rather, the determinative question is whether reasonable jurists reading the case law that existed in

> 1984 could have concluded that Graham's sentencing was not constitutionally infirm. We cannot say that all reasonable jurists would have deemed themselves *compelled to accept Graham's claim* in 1984. . . . The ruling Graham seeks, therefore, would be a "new rule" under *Teague*.

Graham, —— U.S. at ——-——, 113 S.Ct. at 902-03 (emphasis added).[4]

Although the *Graham* majority and dissent disagreed over whether the differences in the type of mitigating evidence offered by Penry and Graham, and the opportunity that each petitioner's jury had to consider that evidence, were sufficient to implicate a new rule in holding for Graham, the dissent never challenged the fundamental premise of *Graham* and the Court's prior cases that *Teague* bars consideration of a claim where the defendant could not even have prevailed on the merits under the law existing at the time his conviction became final. *See*

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[4] *Graham*, and its distinction of *Penry*, follow naturally from *Teague*'s instruction that new obligations are not to be imposed on the states via federal *habeas* review. When Penry's conviction became final, the law was clear that "the State must allow the jury to give effect to mitigating evidence in making the sentencing decision." *Parks*, 494 U.S. at 491, 110 S.Ct. at 1262 (citing *Lockett* and *Eddings*). As noted, the *Penry* majority concluded that the jury could not give any mitigating effect to his evidence within the strictures of the "special issues." Hence, vacating Penry's death sentence, and requiring an additional instruction that the jury could consider his mitigating evidence as such, did not "impose a new obligation," *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070, on the State of Texas. Such an obligation—*i.e.*, that although Texas could channel the effect of a defendant's mitigating evidence, it could not foreclose consideration of that effect altogether—had already been imposed by prior law. Vacating Graham's death sentence, by contrast, would have required a holding that Texas could not channel the effect of a defendant's mitigating evidence at all. Because *Jurek* had approved Texas' sentencing procedure, which restricted a defendant's use of mitigating evidence to the context of the special issue of future dangerousness, such a holding would unquestionably have announced a new rule.

discussion *supra* at ——- - ——; *see also West*, —— U.S. at ——, 112 S.Ct. at 2501 (Souter, J., concurring) (rule is new unless it "dictate[s] the rule on which the conviction may be held to be *un*lawful" (emphasis added)).

Graham, in short, proves that for *Teague* purposes the majority has a different understanding of the concept of "applying" prior precedent than does the Supreme Court. The majority holds that a new rule is not created if prior precedent is determinative of the result in the case—whether in the petitioner's favor or against him. The Supreme Court could not have been clearer that avoidance of a new rule is possible only where the prior precedent resolves the case in the petitioner's favor. If the Supreme Court had understood the concept as does the majority here, the holding in *Graham* would have been different.

B.

Graham also demonstrates how the majority misreads *Penry* and why the majority mistakenly believes *Penry* supports its understanding of the "new rule" doctrine. Because the majority never comes to grips with *Graham*, it does not recognize that the Court's holding in *Penry*, that the petitioner did not seek a new rule, rested on the conclusion that *Jurek* dictated the resolution of Penry's claim *in his favor*, and not on the fact that *Jurek* in some more general sense governed resolution of the case.[5] That

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[5] The majority ascribes significance to the fact that the Court's holding in *Penry* "repudiated prior Fifth Circuit decisions," *ante* at 884:

> One would think this was an easy case; granting Penry the relief he sought seemingly would have required the creation of a new rule insofar as it would have repudiated prior Fifth Circuit decisions. And, with those Fifth Circuit cases in the legal landscape, presumably a state court at the time [Penry's] conviction became final would not have felt compelled to grant Penry the relief he sought.

Id. at 887.

> This fact of course is not in any way dispositive of the *Teague* inquiry. Prior circuit court decisions not infrequently are

this was the Court's reasoning in *Penry* is evident, if from nothing else, from the fact that the Court specifically framed the question before it as "whether granting [Penry] the relief he seeks would create a 'new rule,'" *Penry*, 492 U.S. at 313, 109 S.Ct. at 2944 (citation omitted), and resolved this question in the same terms, *id.* at 319, 109 S.Ct. at 2947 ("[I]n light of the assurances upon which *Jurek* was based, we conclude that *the relief Penry seeks* does not 'impos[e] a new obligation' on the State of Texas." (emphasis added) (citation omitted)).

Therefore, contrary to the majority's belief, *Penry* was not a "novel" decision, *see ante* at 884; nor does it "demonstrate[] . . . the critical distinction between the *extension* of an existing rule on collateral review and the mere *application* of an existing normative rule . . . to a new set of facts," *id.* (foonote omitted). Rather, as the Court said in *Penry* itself, *see* 492 U.S. at 314-19, 109 S.Ct. at 2944-47, and as it reaffirmed in *Johnson*, *Penry* was a narrow decision entailing a straightforward application of *Jurek*, *Lockett*, and *Eddings* so as to provide Penry with the relief to which he was entitled under those cases:

> The Court [in *Penry*] was most explicit in rejecting the dissent's concern that Penry was seeking a new rule, in contravention of *Teague v. Lane*. Indeed, the Court characterized its holding in *Penry* as a

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"objectively unreasonable," as the Supreme Court found with respect to two Fifth Circuit decisions in *Stringer*, *see* —— U.S. at ——, 112 S.Ct. at 1140. A "reasonable jurist" would simply ignore such objectively unreasonable decisions. In this respect, a reasonable jurist is freer than sitting judges, as *Penry* itself proves. Although the Fifth Circuit panel believed that its prior decisions conflicted with the Supreme Court's holdings regarding restrictions on the consideration of mitigating evidence, *Penry v. Lynaugh*, 832 F.2d 915, 926 (5th Cir. 1987), it nonetheless concluded that, as a panel, it was bound by those decisions.

> straightforward application of our earlier rulings in *Jurek*, *Lockett*, and *Eddings*, making it clear that these cases can stand together with *Penry*.
>
> We confirmed this limited view of *Penry* and its scope in *Graham v. Collins*.

Johnson, —— U.S. at ——-——, 113 S.Ct. at 2667-68 (citations omitted). Had the majority here not ignored *Graham*, it would have understood *Penry*, as does the Supreme Court, as a case where a new rule was not implicated because the relief sought was dictated by prior precedent, specifically *Jurek*.

III.

The majority compounds the error caused by its unexplained refusal to consider *Graham*, and its resulting misreading of *Penry*, by misconstruing *Stringer* and *Cartwright*, the Court's cases that have addressed *Godfrey* challenges in the context of *Teague*'s "new rule" doctrine.

A.

In a statement that betrays the extent of its departure from Supreme Court precedent, the majority says that, "*Stringer* . . . teaches that *Teague* does not bar a habeas petitioner's *invocation of Godfrey* to challenge the constitutional sufficiency of limiting instructions or appellate review if a state uses a vague aggravating factor." *Ante* at 881 (emphasis added); *see also id.* at 881 (the Supreme Court held in *Stringer* "that the application of *Godfrey* does not amount to a new rule for purposes of *Teague*"). *Stringer*, of course, teaches nothing of the sort; rather, *Stringer* holds only that the application of *Godfrey* in the context of the particular facts of *Cartwright* and *Clemons* did not require announcement of new rules. *Stringer*, in short, was an unexceptional application of the Court's consistently-applied standard that granting a *habeas* petitioner his requested relief will not "ex-

tend" *Godfrey* so as to announce a new rule when that relief, *i.e., a holding in favor of the defendant,* is "dictated" by *Godfrey*. This is brought into relief, as in *Penry,* by the Court's own statement of the issue before it, namely, "whether granting the relief sought [by the petitioner] would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent." *Stringer,* —— U.S. at ——, 112 S.Ct. at 1135.

1.

The question before the Court in *Stringer* was whether either *Cartwright* or *Clemons* announced a new rule for purposes of *Teague*.[6] The Court held that neither did.

The facts and circumstances in *Cartwright* were virtually indistinguishable from those in *Godfrey*. In *Cartwright,* the Court found that "the language of the Oklahoma aggravating circumstance at issue—'especially heinous, atrocious, or cruel'—gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in *Godfrey,*" and that "the conclusion of the Oklahoma court that the events recited by it 'adequately supported the jury's finding' was indistinguishable from the action of the Georgia court in *Godfrey,* which failed to cure the unfettered dis-

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[6] As did Graham, Stringer sought the benefit of decisions that postdated the finality of his conviction. The Supreme Court stated in *Stringer* that the threshold question when a *habeas* petitioner relies on a subsequent decision is "whether the decision relied on announced a new rule." *Stringer,* —— U.S. at ——, 112 S.Ct. at 1135. If it is determined that the subsequent decision did not announce a new rule, a second injury must be undertaken. That inquiry is "whether granting the relief sought would create a new rule because the prior decision is applied in a new setting, thereby extending the precedent." *Id.* Where instead, as here, the petitioner seeks the benefit of a decision that predated the finality of his conviction, the question is simply whether the relief he seeks is dictated by that precedent. In substance, the questions in the two contexts are identical.

cretion of the jury and to satisfy the commands of the Eighth Amendment." *Cartwright,* 486 U.S. at 363-64, 108 S.Ct. at 1859.

Stringer summarily held that *Cartwright* did not announce a rule "new" from *Godfrey* precisely because the instructions on the aggravating circumstance in *Cartwright* and *Godfrey* were as close to identical as was possible given the differing sentencing contexts in Oklahoma and Georgia. Given these similarities, reasonable jurists reading the caselaw existing at the time of Cartwright's sentencing, which included *Godfrey,* would have felt compelled to rule in Cartwright's favor. That is, *Godfrey* dictated the relief sought by Cartwright. *Compare Graham,* —— U.S. at ——, 113 S.Ct. at 902.

Put another way, if *Teague* had been decided before *Cartwright,* and if Oklahoma had invoked *Teague* in its argument before the Supreme Court, the Court would have held that reasonable jurists could *not* have concluded that Cartwright's jury instructions complied with *Godfrey,* and thus would have been "compelled to rule in his favor." As the Tenth Circuit noted in *Cartwright,* the Oklahoma Court of Criminal Appeals had dropped from its so-called limiting construction the one phrase that the Supreme Court *had* previously approved as constitutionally limiting an analogous, vague aggravating factor, *i.e.,* "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Cartwright v. Maynard,* 822 F.2d 1477, 1489 (10th Cir.1987) (citing *Proffitt v. Florida,* 428 U.S. 242, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976)).

Although the majority seems to think otherwise, the fact that the Oklahoma Court of Criminal Appeals had previously approved unconstitutionally vague limiting instructions only demonstrates that the Oklahoma court's prior actions were objectively "unreasonable" for *Teague* purposes, just as in *Stringer* the Fifth Circuit had been objectively "unreasonable" in holding that *Godfrey* did

not apply to Mississippi's capital punishment scheme. *See Stringer,* —— U.S. at ——, 112 S.Ct. at 1140 ("The short answer . . . is that the Fifth Circuit made a serious mistake in *Evans v. Thigpen* [809 F.2d 239 (5th Cir. 1987)] and *Johnson v. Thigpen* [806 F.2d 1243 (5th Cir. 1986)] [in so concluding]."). *See also supra* note 5.

2.

Contrary to the majority's impression, the significant holding in *Stringer* was not that *Cartwright* did not announce a new rule. Mississippi had conceded this point, *see Stringer,* —— U.S. at ——, 112 S.Ct. at 1135, which renders curious the majority's assertion that "[t]he State of Mississippi invoked *Teague,* arguing that the petitioner could not rely on *Cartwright* because that decision was announced after his conviction became final." *Ante* at 881. And the Supreme Court deemed the state's concession "wise":

> In the case now before us Mississippi does not even argue that [*Cartwright*] itself announced a new rule. To us this appears a wise consession. *Godfrey* and [*Cartwright*] did indeed involve somewhat different language. But it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case. In applying *Godfrey* to the language before us in [*Cartwright*], we did not "brea[k] new ground."

Stringer, —— U.S. at ——, 112 S.Ct. at 1135 (quoting *Butler,* 494 U.S. at 412, 110 S.Ct. at 1216). Rather, the significant holding of *Stringer,* a holding the majority never even mentions, was that *Clemons* did not announce a rule new from *Godfrey* either.

In *Stringer,* Mississippi contended that *Clemons,* a direct review case decided after Stringer's conviction became final, had announced a new rule, and thus was unavailable to Stringer as authority in support of the relief

he sought. The state argued that reasonable jurists would not have believed that the *Clemons* holding was dictated by prior precedent because Mississippi required aggravating factors to be weighed against mitigating circumstances in determining whether to impose the death penalty, unlike Oklahoma and Georgia, which required only that a single aggravating factor support a death penalty. *Stringer,* —— U.S. at ——, 112 S.Ct. at 1136.

The Supreme Court rejected the state's contention, noting that if anything, *Godfrey* clearly applied in a "weighing" state such as Mississippi:

> As a matter of federal law, moreover, the view of the Mississippi Supreme Court that *Godfrey*'s dictates apply to its capital sentencing procedure is correct. Indeed, it is so evident that the issue was not even mentioned in *Clemons.*

Id. at ——, 112 S.Ct. at 1139. In a weighing state, the Court reasoned, the effect of an invalid aggravating factor cannot be cured without either trial or appellate reweighing, because it cannot be known if, absent the invalid factor, the jury would have weighed the aggravating factors and mitigating circumstances in the way it initially did:

> When the weighing process itself has been skewed, only constitutional harmless-error analysis of reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Id. at ——, 112 S.Ct. at 1137. In the end, then, the Court concluded that the different roles played by the aggravating factor in the Georgia, Oklahoma, and Mississippi schemes "underscore[] the applicability of *Godfrey* and [*Cartwright*] to the Mississippi system." *Id.*

The relevant facts in *Clemons,* therefore, were no different from those in *Godfrey.* In both cases, the death penalty had been imposed on the basis of an invalid aggravating factor. *See Clemons,* 494 U.S. at 742-43, 110

S.Ct. at 1445 ("[T]he trial court instructed [Clemons'] jury in the bare terms of the Mississippi [aggravating] statute."). And in neither case was that factor cured on appeal: In *Godfrey*, there was essentially no review at all, while in *Clemons* there was no evidence that the Mississippi Supreme Court had undertaken the reweighing that was constitutionally necessary under a scheme such as Mississippi's. *Id.* at 751-52, 110 S.Ct. at 1449-50. For these reasons, the Court held that *Godfrey* dictated the relief sought by Clemons, and therefore that *Clemons* had not announced a new rule. *See Stringer*, —— U.S. at ——- - ——, 112 S.Ct. at 1136-40; *see also id.* at ——, 112 S.Ct. at 1144 (Souter, J., dissenting) (criticizing majority for concluding "that the outcome in *Cartwright* and *Clemons* was dictated" by existing precedent).

3.

Stringer, in sum, does not support the decision reached by the majority. *Stringer* did not hold, as the majority assumes, that neither *Clemons* or *Cartwright* announced a new rule because their claims were "predicated on" *Godfrey*, or because *Godfrey* "dictated" their "challenges." The Court held that no rule had been created in either case because the facts underlying each petitioner's claim were materially indistinguishable from those underlying Godfrey's claim and therefore *Godfrey* dictated the relief sought by each.

If the facts and circumstances underlying Turner's claim were as indistinguishable from those underlying Godfrey's claim as were Cartwright's and Clemons', *Godfrey* would likewise dictate the relief Turner seeks. Obviously, however, they are not. *See* discussion *infra* at 887-91. *Compare ante* at 882 ("The similarities between *Cartwright* and the instant case are striking.").

B.

Next, in order to reconcile *Cartwright* with its misstatement of the *Stringer* rationale, the majority must

omit the relevant facts of *Cartwright*. The majority recites that "Cartwright's sentencing jury was given a limiting instruction beyond the bare terms of the heinousness factor," *id.* at —— (citing *Cartwright v. Maynard*, 822 F.2d 1477, 1488 (10th Cir.1987)), and that "the Oklahoma Court of Criminal Appeals affirmed after applying a limiting construction to the facts of Cartwright's case, focusing on the 'manner' in which the murder was committed," *id.* (citing *Cartwright v. Oklahoma*, 695 P.2d 548, 554 (Okla.Crim.App.1985)). Both statements, while literally correct, are incomplete in the only respects that are relevant.

As the record in *Cartwright* discloses, and the Supreme Court in *Stringer* held, the *Cartwright* jury instructions and appellate review were indistinguishable in substance from the instructions and review held to be inadequate in *Godfrey*. The so-called "limiting" instruction of the Oklahoma aggravating factor for murders that were "especially heinous, atrocious or cruel," which the majority omits, reads as follows:

> The term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

Cartwright, 822 F.2d at 1488. As the Supreme Court explained in *Stringer*, "appl[ying] the same analysis and reasoning [of *Godfrey*]," the Court in *Cartwright* held that "th[is] language gave no more guidance than did the statute in *Godfrey*." *Stringer*, —— U.S. at ——, 112 S.Ct. at 1135. Or, as Justice Marshall later observed, Cartwright's instruction provided no limitation whatsoever on the jury's discretion: "[L]ike 'heinous' and 'atrocious' themselves, the phrases 'extremely wicked or shockingly evil' and 'outrageously wicked and vile' could be used by '"[a] person of ordinary sensibility [to] fair characterize almost *every* murder."'" *Shell*, 498 U.S. at 3, 111 S.Ct.

at 314 (Marshall, J., concurring) (quoting *Cartwright*, 486 U.S. at 363, 108 S.Ct. at 1858 (quoting in turn *Godfrey*, 446 U.S. at 428-29, 100 S.Ct. at 1765)) (emphasis added in *Shell*).[7] Cartwright's instructions therefore were unconstitutional under *Godfrey* because they could not reasonably be said to have provided a "principled way to distinguish [a] case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767.

Cartwright's appellate review was similarly inadequate. In its opinion affirming the Tenth Circuit, the Supreme Court characterized that review as follows: "[T]he Oklahoma court simply had reviewed all of the circumstances of the murder and decided whether the facts made out the aggravating circumstance," which itself was unconstitutionally vague. *Cartwright*, 486 U.S. at 360, 108 S.Ct. at 1857 (citing *Cartwright*, 822 F.2d at 1491). The Court continued: "[T]he conclusion of the Oklahoma court that the events recited by it 'adequately supported the jury's finding' was *indistinguishable* from the action of the Georgia court in *Godfrey*, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment." *Cartwright*, 486 U.S. at 364, 108 S.Ct. at 1859 (emphasis added). Thus, what the majority describes as the Oklahoma appellate court's "limiting construction [applied] to the facts of Cartwright's case, focusing on the 'manner' in which the murder was committed," *ante* at 881, was, under *Godfrey*, no limitation at all.

Cartwright therefore is no different from *Clemons* (or, in principle, from *Penry*). And all three are properly

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[7] The instruction with respect to the definition of the term "cruel" was apparently more limiting. However, Oklahoma's "heinousness" aggravating factor was phrased in the disjunctive, and therefore Cartwright's jury could have imposed the death penalty based on one of the unquestionably vague terms. Thus, the "cruelty" instruction cannot serve to distinguish Cartwright's instructions from Godfrey's. *Shell*, 498 U.S. at 3-4, 111 S.Ct. at 314 (Marshall, J., concurring).

understood simply as cases in which new rules were not announced because the facts and circumstances presented by the petitioner in each were so close to those present in the prior precedent that the prior decisions, when applied, dictated the relief each petitioner sought. Of course, the similarities between *Godfrey*, *Cartwright*, and *Clemons*, on the one hand, and Turner's case on the other, are anything but "striking." *Compare ante* at 882.

C.

Finally, as it mistakenly believes it must to remain consistent, the majority misreads *Shell* in much the same way that it misreads *Stringer* and *Cartwright*, and for this reason, its attempt to summon *Shell* in support of its conclusion that any claim "predicated on" *Godfrey* is not *Teague*-barred is ill-fated.

The Court in *Shell* held that the aggravating factor challenged by the petitioner was the same as that invalidated in *Cartwright* and that the limiting construction was, as Justice Marshall noted, "nearly identical" to the instruction given by the trial court in that case. *Shell*, 498 U.S. at 2, 111 S.Ct. at 314 (Marshall, J., concurring). In sum, "there [was] no legally tenable distinction . . . between [*Shell*] and *Maynard v. Cartwright*." *Id.* at 4, 111 S.Ct. at 314. Given that there were no material differences between the jury instructions and appellate reviews in *Shell* and *Cartwright*, there is not the requisite factual predicate for the majority's conclusion that *Shell* supports the newly announced standard that the prior precedent must only dictate the result in the case, not the relief sought. *Shell* is analytically no different from *Clemons*, or from *Cartwright*, freed from the context of *Teague*. Thus, any attempt to divine the majority's standard from the reasoning in *Shell* is futile.

D.

The majority appears ultimately to have been misled by the coincidence that in all of the Court's *Godfrey* cases discussed above, the Court held that *Godfrey* dictated

resolution of the petitioner's claim. From this the majority infers that the disposition of a *Godfrey* challenge can never announce a new rule. Its error, of course, is its failure to understand that the holdings in all of these cases rested on the Court's conclusion that the facts underlying each petitioner's claim—unlike those underlying Turner's claim—were indistinguishable from the facts in *Godfrey*, and therefore that *Godfrey* dictated the relief sought by each petitioner.

IV.

A.

When the Supreme Court's precedents are properly read and applied, it is obvious that *Godfrey* cannot possibly be said to dictate the relief Turner seeks, because the facts underlying Turner's claim are precisely the opposite of, and therefore *ipso facto* distinguishable from, those underlying Godfrey's claim. *See West*, —— U.S. at ——, 112 S.Ct. at 2497 (O'Connor, J., concurring) ("[F]ederal courts must make an independent evaluation of the precedent existing at the time the state conviction became final in order to determine whether the case under consideration is meaningfully distinguishable."). This is so even though, in the words of the majority's standard, Turner's claim may be said to be "predicated on" *Godfrey* and his "challenge" "dictated" by that case. *See Parks*, 494 U.S. at 491, 110 S.Ct. at 1262 (holding that it is not enough that the prior decision "inform, or even control or govern" analysis of the petitioner's claim).

The distinctions between *Godfrey* and the case *sub judice*, which perforce even the majority must recognize, are evident upon the most cursory review. The only instructions that Godfrey's jury received were that it could impose the death penalty if it found that his offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Godfrey*, 446 U.S. at 422, 100 S.Ct. at 1762 (quoting Ga.Code § 27-2534.1(b)(7) (1978)).

Godfrey's trial judge made no effort to define further the terms "aggravated battery" or "depravity of mind." *See Godfrey,* 446 U.S. at 426, 100 S.Ct. at 1764. When Godfrey's jury imposed the death sentence, it specified only that "the offense of murder was outrageously or wantonly vile, horrible and inhuman." *Id.* And in affirming Godfrey's sentence, the Georgia Supreme Court stated merely that the jury's phraseology was "not objectionable," *Godfrey v. State,* 243 Ga. 302, 253 S.E.2d 710, 718 (1979), and that the evidence supported the jury's finding of the statutory aggravating circumstance, *id.* 253 S.E.2d at 717-18.

By contrast, Turner's jury was instructed on both the "aggravated battery" and "depravity of mind" prongs of Virginia's "vileness" aggravating factor. The trial court informed the jury that "an aggravated battery is a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder," J.A. at 517-P, and that "depravity of mind is a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation," *id.* at 517-Q. It further instructed that "[m]aliciously means intentionally doing a wrongful act to another without legal excuse or justification." *Id.* at 517-I. These instructions on "aggravated battery" and "depravity of mind" tracked the Virginia Supreme Court's limiting constructions set forth in *Smith v. Commonwealth,* 219 Va. 455, 477, 248 S.E.2d 135, 149 (1978), *cert. denied,* 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979), which have been consistently applied without reversal.

Turner's appellate review, too, was quite different from Godfrey's. In stark contrast to the substantively meaningless appellate review of Godfrey's sentence, the Virginia Supreme Court, on Turner's direct appeal of his currently challenged sentence, applied the limiting constructions from *Smith* to Turner's facts, to hold that his crime both constituted an "aggravated battery" and demonstrated

"depravity of mind." *Turner v. Commonwealth*, 234 Va. 543, 553, 364 S.E.2d 483, 489, *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988) ("We think that the evidence of Turner's conduct in killing his victim meets [the *Smith* definition of aggravated battery] clearly and completely. . . . We think that the evidence of Turner's conduct in killing his victim also meets [the *Smith* definition of depravity of mind] clearly and completely.").

As the majority's own opinion shows, reasonable jurists considering Turner's claims at the tmie his conviction became final would have concluded that his sentencing procedures easily satisfied *Godfrey*'s commands. *See ante* at 889-91. By requiring that the jurors find factors above and beyond those present in all intentional killings, Turner's jury instructions reasonably could be said to have satisfied the plurality's commands in *Godfrey* that aggravating factors be limited so that they are not applicable to every murder, and that juries be provided with a "principled way to distinguish [a] case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767; *see also Proffitt v. Florida*, 428 U.S. 242, 255, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976) (plurality opinion) (stating that the Florida Supreme Court had imposed a constitutional construction on Florida's "heinousness" aggravating factor by limiting it to the " 'conscienceless or pitiless crime which is unnecessarily torturous to the victim' " (quoting *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973)). In fact, that Turner's instructions met *Godfrey*'s commands is the import of this circuit's 1985 decision in *Turner v. Bass*, 753 F.2d 342, 353 (4th Cir.1985), *rev'd on other grounds sub nom. Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), which rejected Turner's similar *Godfrey* challenge to the *Smith* limiting construction of aggravated battery.

So, too, by applying the *Smith* limiting constructions to the facts of Turner's case, the Virginia Supreme Court

performed exactly the appellate review that one reasonably would think *Godfrey* required. *Compare Cartwright*, 486 U.S. at 363, 108 S.Ct. at 1859 ("The affirmance of the death sentence by the Georgia Supreme Court [in *Godfrey*] was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance."). Given that Turner shot Smith twice while Smith lay helpless from the first shot to his head, and assertedly killed Smith merely for "snitching" on him, *compare Godfrey*, 446 U.S. at 433, 100 S.Ct. at 1767 (victims killed instantly from shots to head), there is no doubt that a "reasonable jurist" would have concluded that the state court's assessment was the product of conscientious and meaningful appellate review. As a panel of this court said in *Turner v. Bass*, "the murder here was cold-blooded and calculated, involving no element of emotional trauma as was present in *Godfrey*. Turner initially shot Smith for no reason at all. While Smith lay alive but helpless and while Officer Bain pleaded, Turner fired two shots into Smith's chest." *Turner*, 753 F.2d at 353.

Contrary to Turner's contention, constitutionally inadequate appellate review is not demonstrated by the mere statistic that the Virginia Supreme Court has not overturned a single death sentence based on the "vileness" factor. Without more, the statistic could as easily reflect that Virginia juries impose, and its courts affirm, capital punishment based on the "vileness" factor only in the most gruesome circumstances. The endless parentheticals in Turner's brief summarizing the hideous fact patterns of those crimes appear to bear out just this.[8] It is only

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[8] *See* Brief of Appellant at 53 n. 19 (citing *George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992) (defendant sodomized child victim and used stun gun on victim's penis); *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227, *cert. denied*, —— U.S. ——, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991) (defendant abducted victim, stripped her, beat her, and sexually assaulted

regrettable that the state of capital punishment law is such that one legitimately can argue against the death penalty, as does Turner, on the ground that his crime "did not involve rape, torture, abuse of the body or other

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her, before killing her by crushing her head in four places with large rock); *Stockton v. Commonwealth*, 241 Va. 192, 402 S.E.2d 196, *cert. denied*, —— U.S. ——, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991) (defendant shot victim and cut off his hands at the wrists while victim still alive); *Bennett v. Commonwealth*, 236 Va. 448, 374 S.E.2d 303 (1988), *cert. denied*, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989) (over extended period, bound victim suffered repeated blows to head and face, was stabbed four times and strangled); *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352, *cert. denied*, 482 U.S. 931, 107 S.Ct. 3219, 96 L.Ed.2d 705 (1987) (defendant choked victim, robbed him, kicked him in face several times and used unconscious body as target for knife-throwing); *Wise v. Commonwealth*, 230 Va. 322, 337 S.E.2d 715 (1985), *cert. denied*, 475 U.S. 1112, 106 S.Ct. 1524, 89 L.Ed.2d 921 (1986) (defendant struck victim's head repeatedly, broke three of victim's fingers, tore flesh from nose and forehead, shot victim in eyeball, threw victim in outdoor toilet and fired shotgun in victim's chest); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815, *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985) (defendant tortured one victim before shooting her in back of head after he ordered her to walk away from him and defendant stripped second victim, raped her, shot her in head and flung her nude body into parking lot); *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984), *cert. denied*, 472 U.S. 1012, 105 S.Ct. 2713, 86 L.Ed.2d 728 (1985) (defendant tied one victim's hands behind her, stuffed sock down her throat, taped mouth and neck, forced her in closet, shot her point blank, doused her with accelerant and set her on fire, and left her still alive and breathing to die of smoke inhalation; attempted to incinerate second victim); *Clozza v. Commonwealth*, 228 Va. 124, 321 S.E.2d 273 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985) (defendant beat 13-year-old victim for over two hours, raped her and penetrated her vagina with twigs and large cylindrical object before internal bleeding suffocated her); *Fitzgerald v. Commonwealth*, 223 Va. 615, 292 S.E.2d 798 (1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1235, 75 L.Ed.2d 469 (1983) (defendant inflicted 184 stab wounds with machete and knife, all sustained before victim's death); *LeVasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984) (victim sustained at least 43 wounds and lacerations;

mutilation," but merely the intentional, coldblooded murder of another human being. Brief of Appellant at 51. *Cf. Godfrey.*[9]

Because the *Smith* limiting constructions given to Turner's jury and applied by the Virginia Supreme Court—*unlike* the Oklahoma procedures in *Cartwright*, or the Mississippi procedures in *Clemons*—fully satisfied what in 1988 reasonable jurists would have thought were *Godfrey*'s commands, vacating Turner's death sentence on the basis of *Godfrey* clearly would "break new ground." Whereas *Godfrey* "dictated" a holding for the defendants

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back of head crushed by blows with blunt instrument; ice pick and two-pronged carving fork found protruding from victim's back; victim's ankles bound together; liquid bleach poured over body; and attempt to incinerate body); *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982) (defendant confessed to choking 63-year-old widow with bare hands, strangling her with rope, and cutting her throat; victim was found with one umbrella inserted into her vagina and another in her rectum); *Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980) (defendant raped woman in front of husband and child, after which woman was shot in head four times while family watched, husband was then shot in front of child, and finally child was shot); *Mason v. Commonwealth*, 219 Va. 1091, 254 S.E.2d 116, *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979) (defendant raped 71-year-old woman, struck her several times in head and body with an ax, shoved ax handle into her rectum, drove a nail into her wrist, and set her on fire while still alive)).

[9] In *Godfrey*, the petitioner had purposefully shot both his wife and mother-in-law in the head with a shotgun, killing each instantly in the presence of his 11-year old daughter. Moments later, he confessed to the police that he had "done a hideous crime, . . . but [had] been thinking about it for eight years" and would "do it again." *Godfrey*, 446 U.S. at 425-26, 100 S.Ct. at 1763. The plurality vacated petitioner's death sentence on the ground, *inter alia*, that the death penalty had been imposed capriciously because the victims had been killed "instantaneously," and thus, according to the plurality, the decision to impose the death penalty had not been based on reason.

in *Cartwright* and *Clemons*, it just as clearly "dictates" a holding for the Commonwealth here.[10]

The *Jurek/Penry/Graham* line reached the same analytic conclusion conversely. Because Graham's evidence was more like Jurek's than like Penry's, and *Jurek* had held that such evidence was given constitutionally adequate consideration under the Texas death penalty scheme, extending *Penry* to cover Graham's mitigating evidence would have necessitated "a wholesale abandonment of *Jurek*." *See Graham*, —— U.S. at ——, 113 S.Ct. at 902. So also, declaring Turner's sentence *un*constitutional would require not merely an "application" of *Godfrey*, nor even its "extension," but really its repudiation.[11] It would require a holding that the class of

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[10] *Compare Smith v. Dixon*, 766 F.Supp. 1370, 1383-86 (E.D.N.C. 1991), *aff'd*, 996 F.2d 667 (4th Cir.1993), *rev'd on other grounds*, 14 F.3d 956 (4th Cir.1994) (*en banc*), *petition for cert. filed*, (U.S. May 27, 1994) (No. 93-9353) (*Godfrey* dictates relief sought by petitioner when the jury was instructed that "[h]einous means extremely wicked or shockingly evil," and when it was unclear from the record whether the North Carolina Supreme Court had applied an adequate limiting construction).

[11] It is difficult to understand the majority's statement that in *Jones v. Murray*, 976 F.2d 169 (4th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 27, 120 L.Ed.2d 951 (1992), "we indicated that challenges to Virginia's limiting instructions and appellate review were not barred by *Teague*." *Ante* at 882. In *Jones*, our discussion of *Teague* was limited to the following:

> Neither party argues that the new cases on which Jones relies [*Stringer* and *Sochor v. Florida*, —— U.S. ——, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992)] creates a new rule that cannot be applied retroactively in a collateral review of Jones's death sentence. *Cf. Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (prohibiting retroactive application on collateral review of cases that announce new rules). Both sides agree that these cases are firmly grounded in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). *See Stringer v. Black*, —— U.S. ——, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (holding that application of *Godfrey* rules to weighing statute was not a new rule). There-

death-eligible defendants in Virginia must be narrowed even further than *Godfrey* reasonably indicated, or that the Virginia Supreme Court's review of death sentences should be even more discriminating than *Godfrey* reasonably suggested. Such a holding would, quite obviously, impose a "new obligation," *Teague*, 489 U.S. at 301, 109 S.Ct. 1060, on the Commonwealth of Virginia. *See Butler*, 494 U.S. at 412, 110 S.Ct. at 1216 ("A new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new obligation.' "). Equally certain, it would announce a new rule of constitutional law.[12]

B.

In deciding that Turner is not seeking the benefit of a new rule, the majority endorses for this circuit, *see ante*

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fore, there is no procedural bar under *Teague* to the application of the new cases on which Jones relies.

Id. at 173. What this passage "indicates" is simply that the *Jones* panel accepted the parties' *agreement* that the two cases on which the petitioner relied, *Stringer* and *Sochor*, did not *themselves* create new rules of constitutional law. It cannot be taken as a statement that every *habeas* petitioner's challenge to Virginia's limiting instructions and appellate review, no matter how strained, is not *Teague*-barred because it happens to be "predicated" on *Godfrey*.

[12] Turner's claim that his sentence was unconstitutional because "the crime was less culpable than the conduct in other death penalty cases or in many cases in which the defendant was sentenced to life imprisonment," Appellant's Brief at 50, is even more clearly barred because it appears to demand some form of proportionality review *in addition to* application of the *Smith* limiting constructions. However, in 1984, the Supreme Court held that proportionality review was not constitutionally required. *See Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). As for Turner's allegation that his *federal* constitutional rights were violated because his crime does not "fit" within Virginia's vileness factor, granting his relief would require a rule of constitutional law far less deferential to state courts than the "rational factfinder" standard the Supreme Court applied to such claims in *Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). This assumes, of course, that the application of the "rational factfinder" standard in *Jeffers* itself was dictated by precedent.

at 885, the suggestion of Justice Kennedy in *West* that there are certain types of constitutional rules—rules "*designed* for the specific purpose of evaluating a myriad of factual contexts"—that establish general standards "which of necessity require[ ] a case-by-case examination of the evidence," and the application of which therefore only infrequently yields "a result so novel that it forges a new rule, one not dictated by precedent." *West*, —— U.S. at ——, 112 S.Ct. at 2499 (Kennedy, J., concurring) (emphasis added). Such rules, it seems, may be viewed as allowing for exceptions to the general *Teague* analysis outlined above. Even were I to agree with Justice Kennedy's observations, I would have to disagree with the majority's assertion that the rule of *Godfrey*, like the sufficiency of the evidence rule of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which Justice Kennedy discussed in *West*, is one of these rules of general application. *See ante* at 885-87.

Certainly the rule of *Godfrey* is no more expansive than the rule of *Jurek* and *Penry*, namely that in channeling a defendant's use of mitigating evidence, the state may not foreclose its mitigating effect altogether. Indeed, the *Godfrey* rule is probably *less* expansive than the *Jurek/Penry* rule, because mitigating evidence certainly comes in more forms than limiting constructions of unconstitutionally vague aggravating factors. *See, e.g., Clark v. Collins*, 19 F.3d 959, 963 (5th Cir.1994) (sexual abuse); *Crank v. Collins*, 19 F.3d 172, 175 (5th Cir.1994) (trustworthiness, well-disciplined nature, caring and loving character, family values); *Motley v. Collins*, 18 F.3d 1223, 1229 (5th Cir.1994) (physical, sexual, and psychological abuse by parents, including father's "squashing" defendant's pet gerbils to death in front of him); *Madden v. Collins*, 18 F.3d 304, 307-08 (5th Cir.1994) (dyslexia and "personality avoidance disorder"). Since *Graham*—which, significantly, Justice Kennedy joined—establishes that the *Jurek/Penry* rule is not one of the general rules described by Justice Kennedy

in *West*, it follows that the narower rule of *Godfrey* cannot be such a rule.[13] *See also Graham*, —— U.S. at ——, 113 S.Ct. at 920. (Souter, J., dissenting) (opining that majority's distinction of *Penry* on basis of differences in type of mitigating evidence "flies in the face" of Justice Kennedy's *West* concurrence). Justice Kennedy's own opinion in *West* confirms as much, by nowhere suggesting that *Godfrey*, *Stringer*, or indeed any case in the *Godfrey* line, qualifies as a rule of general application, notwithstanding that his full discussion of general application rules in *West*, which included an analysis of *Stringer*, offered him ample opportunity to do so. *See West*, —— U.S. at ——, 112 S.Ct. at 2499 (Kennedy, J., concurring).[14]

V.

Because I conclude that reasonable jurists hearing Turner's "vileness" claims in 1988 would, if anything, have felt compelled by existing precedent to rule *against* him on those claims, and therefore that granting his proposed relief and holding his death sentence unconstitutional would announce a new rule of constitutional law, I believe that we are barred from considering those claims under *Teague*. I cannot, therefore, join the majority's opinion, which holds to the contrary.

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[13] I also conclude that Turner's "vileness" claims do not fall within either of *Teague*'s two exceptions. Granting his relief would not prohibit "a certain category of punishment for a *class of defendants because of their status or offense.*" *Penry*, 492 U.S. at 330, 109 S.Ct. at 2953 (emphasis added). Nor would it lead this court to announce a " 'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Parks*, 494 U.S. at 495, 110 S.Ct. at 1264 (quoting *Teague*, 489 U.S. at 311, 109 S.Ct. at 1075).

[14] I do not question the majority's conclusion that Turner's *Strickland* claims are not *Teague*-barred, although I do not concur in its reasoning on this score. Essentially for the reasons explained by the majority, I agree with the majority that Turner's ineffective assistance of counsel claims are without merit.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
ALEXANDRIA DIVISION

Civ. A. No. 91-1846-AM

WILLIE LLOYD TURNER,
Petitioner,
v.
DAVID A. WILLIAMS, Warden,
Powhatan Correctional Center,
Respondent.

Feb. 1, 1993

MEMORANDUM OPINION

CACHERIS, Chief Judge.

This matter is before the Court on Respondent David A. Williams' motion to dismiss Petitioner Willie Lloyd Turner's 28 U.S.C. § 2254 (1988) petition for a writ of habeas corpus. Respondent's motion is brought pursuant to Federal Rules of Civil Procedure 12(b)(6), or in the alternative Rule 56(b). For reasons set forth below, Respondent's motion is GRANTED, judgment entered in favor of Respondent, and the petition for habeas corpus dismissed with prejudice.[1]

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[1] Petitioner has filed three additional motions, including a Motion for Evidentiary Hearing, Motion for Discovery and Requests for Production of Documents, and Motion for Funds for a Clinical Neuropsychiatric Examination Pursuant to 18 U.S.C. § 3006A(a)

I. BACKGROUND

Over fourteen years ago, at approximately 11:30 a.m. on July 12, 1978,[2] Petitioner Willie Lloyd Turner entered Smith Jewelers store located in the City of Franklin, Virginia, which was owned and operated by W. Jack Smith, Jr. As Turner entered the store, he carried with him a sawed-off shotgun concealed under a green towel. Turner walked to the back of the store, and without saying a word motioned toward Smith with his gun, causing Smith to begin loading money and jewelry into a jewelry bag. While he was stuffing the jewelry bag, Smith was inconspicuously able to activate the store's silent alarm. In almost immediate response to the alarm, Police Officer Alan D. Bain, Jr., entered the store, and informed Smith that his alarm had been triggered. Before Officer Bain could observe the situation, Turner placed his shotgun next to Officer Bain's head and ordered Bain to remove his service revolver, which Turner then confiscated. Turner then ordered Smith to turn off the alarm and continue loading bags with jewelry. After fidgeting with the revolver for a few moments, Turner fired the gun into the back wall of the store, yelling that he did not want any more police contacted.

At this point, Smith started to step out from behind the counter. Turner looked at him for a moment, and then

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& (e) (1992). Because of the Court's disposition of Respondent's Motion to Dismiss, these motions are dismissed as moot.

[2] The recitation of facts is a compilation of testimony given at the original trial, which was reintroduced at the second resentencing trial held before the Honorable James C. Godwin. *See Commonwealth v. Turner*, No. 870554, Tr. at 250-324 (Southampton County Cir.Ct. January 7-9 & 12, 1987) [hereinafter "Transcript I"] (testimonies given by Judith R. Cosby, a customer at the store during the attempted robbery; Mary J. Huffman, a store clerk working at the time of the attempted robbery; Dr. Faruk Presswalla, Commonwealth of Virginia Deputy Chief Medical Examiner who examined the body of W. Jack Smith, Jr.; and Alan D. Bain, Jr., the police officer initially responding to the silent alarm.

shot Smith in the head with the revolver, causing Smith to yell, slump down, and fall to the floor. The bullet passed through Smith's scalp, and although not fatal, it caused bleeding and bruising to the brain surface. The shot knocked Smith unconscious, where he remained crumpled behind the counter, bleeding from his head, and emitting a faint gurgling noise.

Turner backed up, and according to Judith R. Cosby, a customer in the store at the time, declared "I'm going to kill that nig[g]er for snitching on me."[3] Turner then reached over the counter, rapidly firing two successive close range pistol shots into the left side of the unconscious Smith's chest. The shots caused Smith's body to jump at the force of impact, with one of the bullets penetrating his heart, food and wind pipes, finally lodging in his spine. The other bullet passed through his chest and lung, exiting out his back, so that the flattened slug was later found loose in his shirt. There was no more noise or motion from Smith following these shots. The medical examiner testified that the shots to Smith's chest were the cause of death, and that either shot alone would have been sufficient to kill him. After Smith's body lay lifeless, Officer Bain was able to regain control of his weapon, and subsequently subdue Turner.

Turner was convicted of murdering Smith on December 4, 1979, and on December 6, 1979, a jury sentenced him to death, which the Supreme Court of Virginia approved on appeal. *Turner v. Commonwealth,* 221 Va. 513, 273 S.E.2d 36 (1980) (*Turner I*), *cert. denied sub nom. Turner v. Virginia,* 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981). On April 30, 1986, the United States Supreme Court upheld Turner's conviction, but

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[3] *Transcript I,* supra note 2, at 258. Officer Bain reports the statement as having been "I'm going to kill this nigger squealer." *Id.* at 306. As Smith was white, there is no readily apparent explanation for Turner's use of this racial epithet, nor is one necessary. The quote is given here simply to display Turner's reason, given in his own words, for ending Mr. Smith's life.

reversed his death sentence because of the trial court's failure to question prospective jurors about possible bias resulting from the fact that Turner was black and his victim was white. *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986).

The case was then returned to the Circuit Court for the County of Southampton, Virginia, the Honorable James C. Godwin presiding, for a new jury trial on the sentence, which took place on January 7-9, and 12, 1987. One of the decisions to be made at this point by court-appointed attorney J. Lloyd Snook and assisting counsel Thomas L. Woodward, Jr.,[4] was whether to tell the jury that

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[4] Turner was represented in these proceedings primarily by J. Lloyd Snook, who had been Turner's counsel since his first appeal to the Virginia Supreme Court. Prior to that, Thomas L. Woodward, Jr. had represented Turner, and he continued thereafter to act in a secondary role as co-counsel. It is the actions of these attorneys upon which Petitioner bases his current claims of ineffective assistance of counsel. In his May 23, 1990, letter, Judge Godwin makes the following statements concerning these counsel:

> Both attorneys were extremely well qualified. Mr. Snook had represented Turner for some seven years and is one of the most experienced criminal lawyers in Virginia. In addition, he has handled more death penalty litigation than any other private attorney in Virginia. He is noted as one of the experts in the field of capital cases.
>
> Mr. Woodward was also a highly experienced criminal lawyer. His practice for 18 years had been predominantly representing criminal defendants from the same or similar backgrounds as Turner. He was undoubtedly one of the most effective criminal lawyers in Eastern Virginia. Mr. Woodward not only knew Turner and his background thoroughly, he also was well acquainted with Mr. Richard C. Grizzard, Commonwealth's Attorney for Southampton County.

Letter from Judge James C. Godwin, Judge for the Southampton County Circuit Court of Virginia, to Walter J. Walvick, habeas counsel for the Petitioner, and Robert H. Anderson, Assistant Attorney General for the Commonwealth of Virginia, at 2 (May 23, 1990) (*Turner v. Williams*, No. 901335, R. at 1245-49 (Southhampton County Cir.Ct. Sept. 11-13, 1989)) [hereinafter *Letter Order*].

Turner previously had received a death sentence.[5]

Snook had been counseled by other death penalty experts against allowing the jury to know of the previous sentence. The difficulty with that advice was that part of the mitigating evidence he planned to introduce concerned Turner's actions during a 1984 escape attempt by himself and other death row inmates at Mecklenburg prison. Judge Godwin had indicated he would not sever any portion of the evidence regarding the fact that Turner was on death row, and that all such rebuttal evidence would be admitted. *See Transcript I*, supra note 2, at 21-24. Snook also felt the jury would be able to figure out on its own that Turner previously had received the death penalty, knowing that Turner had already been convicted, that the offense had occurred some ten years before, and that the only issue before them was whether to impose a life or death sentence. *Transcript II, supra* note 5, at 76. As Prosecutor Grizzard observed when discussing the issue with Snook and Judge Godwin, "any halfway intelligent jury knows that a man that's sentenced to life in the first instance is not appealing the life sentence so that he can get the possibility of a death penalty." *Turner v. Commonwealth*, No. 870554, Tr. at 24 (Southampton County Cir.Ct. Nov.12, 1986). Judge Godwin agreed that "[t]hat should be obvious very quickly." *Id.*

Based on Judge Godwin's comments, as well as his feeling that the jury would realize on its own that there had been a previous death sentence, Snook determined that his best course of action was to have the court inform jurors of the prior death sentence during voir dire. This allowed Snook to gauge any potential resulting prejudice upon the part of individual jurors, as well as to avoid the

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[5] Mr. Snook's reasoning on whether to tell the jury about the prior death sentence is taken from his testimony on that matter at the state collateral hearing. *See Turner v. Williams*, No. 901335, Tr. at 76-85 (Southampton County Cir.Ct. Sept. 11-13, 1989) [hereinafter "*Transcript II*"].

appearance of having held back damaging evidence once the prior death sentence became apparent.

The next major trial decision for Snook came at the end of the Commonwealth's case in chief.[6] After the prosecution rested, Snook felt the Commonwealth had held back about eighty percent of its evidence, saving the most devastating evidence for use in rebuttal to the defendant's case. Snook also was concerned that mitigating evidence on Turner's character ultimately showed more bad than good, and that all of this damaging character evidence would come in if he tried to introduce what relatively limited evidence there was of good character. Finally, Snook felt the jury had been bored by the government's case, so that based on all these factors, putting on mitigating evidence would not have placed the defendant in a better position than the one in which he stood currently. Thus, Snook decided to rest the defendant's case without putting on a defense. Woodward, who was personally acquainted with the prosecutor, concurred. Woodward had tried many cases against prosecutor Grizzard, and he knew Grizzard had a habit of holding back damaging evidence for use in rebuttal.

On January 12, 1987, this second jury returned a verdict again fixing the sentence at death, based solely upon the "vileness" predicate established by Va.Code Ann. § 19.2-264.2 (Michie 1990).[7] This sentence was again

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[6] Mr. Snook's reasoning on whether to put on a defense is taken from his testimony on that matter at the state collateral hearing. *See Transcript II*, supra note 5, at 141-62. Mr. Woodward's concurring views can be found later in the same hearing. *See id.* at 380-94.

[7] In other words, the second death sentence was not based upon a finding of "future dangerousness," even though the court had given an instruction on the dangerousness predicate, and Turner had a lengthy history of serious, violent crimes.

Petitioner's Pre-Sentence Report, *Commonwealth v. Turner*, No. 870554, R. at 44-45 (Southampton County Cir.Ct. Jan. 7-9, 12, 1987) [hereinafter *Record*] (filed with the record on Mar. 16,

upheld on appeal to the Virginia Supreme Court. *Turner v. Commonwealth,* 234 Va. 543, 364 S.E.2d 483 (Va.) (*Turner II*), *cert. denied,* 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988).[8]

The collateral review process began anew when Petitioner filed for a writ of habeas corpus with the Circuit Court for the County of Southampton, based upon alleged ineffective assistance of counsel. An evidentiary hearing on this issue was held before Judge Godwin on September 11-13, 1989. All other claims were dismissed without an evidentiary hearing. On May 23, 1990, Judge Godwin issued a five-page letter order finding nothing to substantiate Turner's claim, and adopting verbatim the Attorney

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1987), reveals the following convictions at the time the second death sentence was imposed (Turner was born December 4, 1945):

> 4/24/63 No Operator's License; 8/13/63 Contributing to the Delinquency of a Minor; 8/13/63 Breaking and Entering; 10/30/63 Escape from Beaumont Industrial School for Boys; 8/22/64 Disorderly Conduct in Stovall's Cafe; 12/7/64 Vagrancy; 3/23/65 Unlawful Concealment of Merchandise Valued at less than $50.00; 8/15/65 Petit Larceny; 12/11/67 Drunk in Public; 12/12/67 Petit Larceny; 12/15/68 Assault & Battery, Illegal Possession of [a] Dangerous Weapon; 5/16/69 Assault With a Deadly Weapon; 3/14/70 Carry[ing] Concealed Weapon (Pistol); 3/14/70 Malicious Maiming; 9/2/70 Violation of National Firearms Act; 6/4/71 Unlawful Wounding; 2/19/74 Murder, Second Degree; 1/29/80 Escape; 2/1/80 Use of a Pistol to Commit Murder; and 2/1/80 Using a Sawed-off Shotgun in Commission of a Robbery.

The fact that the jury did not sentence him to death based on a finding of future dangerousness, despite Turner's history of criminal violence, supports Snook's decision to rest without putting on a defense. At the first trial, although it is not entirely clear because of the jury's failure to properly complete the verdict form, it appears that the first jury imposed death on the basis of both prongs, namely a finding of "vileness" and "dangerousness." *See Turner v. Commonwealth,* 221 Va. 513, 273 S.E.2d 36, 44-45 & n. 12 (1980).

[8] Thus, the petitioner's appeal of his death sentence became final for present purposes upon the United States Supreme Court's denial of certiorari on May 16, 1988.

General's proposed findings of fact.[9] On July 5, 1990, the letter order was formalized in an order dismissing Turner's petition. On April 30, 1991, the Supreme Court of Virginia dismissed Turner's appeal of the lower court's decision. On December 10, 1991, Turner filed this petition, which is his first petition for habeas corpus in federal court with respect to the January 12, 1987 death sentence. The Commonwealth has moved for dismissal of the petition pursuant to Federal Rules of Civil Procedure 12(b)(6) and 56.

II. APPLICABLE LEGAL STANDARD

The respondent has styled this alternatively as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) or for summary judgment under Rule 56. Because a considerable record has already been developed as a result of prior proceedings in this matter, it is more appropriate for the Court to treat this as a motion for summary judgment, as provided for in Rule 12(b).

Summary judgment is appropriate only if " 'the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Baber v. Hospital Corp. of America*, 977 F.2d 872, 874 (4th Cir.1992); Fed.R.Civ.P. 56(c). "A district court must grant summary judgment if, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an essential element of that party's case." *Baber*, 977 F.2d at 874 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d (1986)).

In summary judgment proceedings, the moving party must demonstrate absence of a genuine issue of material

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[9] *See Letter Order*, supra note 4.

fact. *Baber*, 977 F.2d at 874. Once the moving party has met its burden, the nonmoving party must come forward with some evidence beyond mere allegations contained in the pleadings to show there is a genuine issue for trial. *Id.* at 874-75. "While this does not require the non-moving party to submit evidence in a form that would be admissible at trial . . . 'unsupported speculation is not sufficient to defeat a summary judgment motion.'" *Id.* at 875 (quoting *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir.1987)).

"The mere existence of a scintilla of evidence in support of the [party's] position will be insufficient; there must be evidence on which the jury could reasonably find for th[at] [party]." *Anderson*, 106 S.Ct. at 2512, 106 S.Ct. at 252. Finally, "[i]n reviewing the evidence submitted by the parties . . ., [the court] must view all evidence in the light most favorable to the non-moving party." *Baber*, 977 F.2d at 875.

III. SUMMARY OF THE BASES FOR PETITIONER'S CLAIM THAT HE IS ENTITLED TO A WRIT OF HABEAS CORPUS

A. That he was denied effective assistance of counsel in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because his attorneys;

1) permitted prospective jurors to know about his prior death sentence (discussed *infra* at 1429);

2) improperly decided not to put on for mitigation purposes evidence of Petitioner's actions during an escape attempt involving six death row inmates in 1984 (discussed *infra* at 1429);

3) did not perform adequate pretrial investigation of mitigation evidence (discussed *infra* at 1430);

4) failed to develop and use psychiatric evidence (discussed *infra* at 1431);

5) failed to put on mitigating evidence that had been promised to the jury by the defense in opening statements (discussed *infra* at 1432);

6) failed to object to the presentation of evidence concerning defendant's unconstitutional second degree murder conviction (discussed *infra* at 1432); and,

7) failed to raise and thereby preserve the presently claimed errors (discussed *infra* at 1414-27).

B. That Virginia's capital murder statutory sentencing mechanism has resulted in arbitrary and discriminatory application of the death penalty based upon the offender and victims' race, gender, and financial statuses, so that Petitioner's death sentence was imposed in violation of his rights under the Eighth and Fourteenth Amendments (discussed *infra* at 1417).

C. That the collateral review of his death sentence afforded Petitioner by the Virginia courts was so "shallow and shameful" as to be in violation of his rights under the Eighth and Fourteenth Amendments (discussed *infra* at 1432).

D. That the prosecution used information received from Petitioner's counsel during post-conviction hearings on the original sentence in violation of the attorney-client privilege, and therefore his Fifth Amendment right against self-incrimination, his Sixth Amendment right to counsel, and his Fourteenth Amendment right to due process, which combine to make his death sentence in violation of the Eighth and Fourteenth Amendments (discussed *infra* at 1433).

E. That the court-appointed mental health expert provided to evaluate Petitioner for purposes of mitigation failed to provide competent assistance (discussed *infra* at 1418).

F. That the scope of proportionality review provided by the Virginia Supreme Court is constitutionally inade-

quate generally, as well as in this case (discussed *infra* at 1419).

G. That juror Samuel Lambert should have been struck for cause, because his voir dire revealed he could not refrain from allowing the prior death penalty from affecting his consideration (discussed *infra* at 1434).

H. That the Virginia Capital Sentencing Statute, Va. Code Ann. § 19.2-264.2 (Michie 1990), is unconstitutional on its face and as applied in violation of the Eighth Amendment (discussed *infra* at 1420).

I. That jury instructions were biased toward imposition of the death penalty (discussed *infra* at 1435).

J. That the trial court failed to instruct the jury adequately concerning aggravating and mitigating circumstances in violation of the Eighth and Fourteenth Amendments (discussed *infra* at 1421).

K. That the trial court erred by permitting the jury to impose the death penalty based upon a finding that his conduct was "outrageously or wantonly vile, horrible or inhuman," because the evidence was insufficient to support such a finding (discussed *infra* at 1423).

L. That the trial court improperly excluded evidence or instructions concerning Petitioner's remote chance of parole if given a life sentence, thereby unreasonably interfering with his right to present mitigation evidence (discussed *infra* at 1437).

M. That the trial court improperly removed for cause two jurors whose answers during voir dire concerning inability to apply the death penalty did not sufficiently demonstrate an inability to serve on the jury (discussed *infra* at 1424).

N. That application of Va.Code Ann. § 19.2-264.3(C) (Michie 1990) to Petitioner's case was in violation of the United States Constitution's *ex post facto* clause (discussed *infra* at 1437).

O. That the Commonwealth of Virginia improperly introduced as aggravating evidence an unconstitutional prior conviction for second degree murder (discussed *infra* at 1425).

P. That Petitioner was excluded from critical stages of his resentencing proceeding in violation of his Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution (discussed *infra* at 1426).

IV. DISCUSSION AND APPLICATION OF LAW

A. *Claims Procedurally Barred From Being Pursued.*

1. Legal Framework.

The Commonwealth has asserted that many claims set forth by Petitioner are barred from review on procedural grounds. Therefore, before this Court can consider the merits of Petitioner's asserted grounds for relief, it is necessary to discuss the framework by which habeas corpus claims may be barred from the review of a federal court, and whether any of Petitioner's claims are in fact barred.

The United States Supreme Court has long held that where a state court judgment rests on a state-law ground that is both independent of the merits of the federal claim, and serves as an adequate basis for that judgment, a federal court cannot consider the merits of the federal claim because this would amount to an advisory opinion in violation of Article III of the United States Constitution. *See Coleman v. Thompson*, —— U.S. ——, ——, 111 S.Ct. 2546, 2553-54, 115 L.Ed.2d 640 (1991); *Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 1042-43, 103 L.Ed.2d 308 (1989); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 22 L.Ed. 429 (1875). This proposition applies to state court judgments on direct review before the Supreme Court, and more importantly for these purposes, to state court judgments challenged in federal habeas corpus proceedings pursuant to 28 U.S.C. § 2254 (1988). *Harris*, 489 U.S. at 262, 109 S.Ct. at 1042-43. Further-

more, the independent and adequate state ground doctrine may be based either upon substantive state law, *or* upon a violation of state procedural rules. *Id.* at 261, 109 S.Ct. at 1042.

The question thus arises as to when a state procedural ground is both "independent" and "adequate." A state procedural law is "independent" for these purposes if it does not depend upon a federal constitutional ruling. *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985). A state procedural ground is "adequate" where the procedural rule is followed strictly or regularly by the courts of that state, *see Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988), so long as the State has a legitimate interest in enforcing the procedural rule. *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7, 98 S.Ct. 1942, 1951 n. 7, 56 L.Ed.2d 486 (1978); *Wainwright v. Sykes*, 433 U.S. 72, 83 n. 8, 97 S.Ct. 2497, 2504 n. 8, 53 L.Ed.2d 594 (1977).

Finally, for a state procedural ground to bar review, the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case, and its opinion must contain a "plain statement" to this effect. *Harris*, 489 U.S. at 261, 109 S.Ct. at 1042. Thus, where a state court gives a plain statement expressly and unambiguously holding a habeas corpus claim barred on independent and adequate state procedural grounds, that claim will also be barred from review by the federal court. *Harris*, 489 U.S. at 262, 109 S.Ct. at 1042-43; *Bassette v. Thompson*, 915 F.2d 932, 935-37 (4th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1639, 113 L.Ed.2d 734 (1991); *Justus v. Murray*, 897 F.2d 709 (4th Cir.1990); *DeLong v. Thompson*, 790 F.Supp. 594, 600-01 (E.D.Va.1991). Therefore a federal court ordinarily must dismiss those claims expressiy barred by the highest state court on procedural grounds. *Coleman*, —— U.S. at ——, 111 S.Ct. at 2553-57; *Bassette*, 915 F.2d at 935-37; *Pruett v. Thompson*, 771 F.Supp. 1428, 1437 (E.D.Va.1991).

The Court turns first to the question of whether there has been a plain statement by the Virginia Supreme Court to the effect that some of Petitioner's claims are barred on state procedural grounds. In its order upholding the trial court's denial of habeas corpus dated April 30, 1991, the Virginia Supreme Court stated "the petition for appeal is denied for reasons of procedural default." *Turner v. Williams*, No. 901335 (Va. April 30, 1991). The Court finds this statement to be a sufficiently clear or plain statement of procedural default.

Turning to the issue of whether the procedural ground asserted is independent and adequate, the Virginia high court stated in its letter that the procedural rule defined in *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied sub nom. Parrigan v. Paderick*, 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d 804 (1975), barred review of Petitioner's claims listed above in Part III as (B), (E), (F), (H), (J), (K), (M), (O), and (P). *Slayton* stands for the proposition that under Virginia law, a state habeas petition may not be used to review a claim of error in collateral proceedings that could have been, but was not, raised on direct appeal. *Slayton* does not rely upon federal law for its conclusion, and is therefore "independent." Likewise, it serves a legitimate state interest and has been enforced strictly by the Virginia courts, as has been recognized continually by the federal courts, and is thus "adequate." *See Smith v. Murray*, 477 U.S. 527, 533-39, 106 S.Ct. 2661, 2665-69, 91 L.Ed.2d 434 1986) (applying *Slayton* as a legitimate bar to a defaulted claim); *Poyner v. Murray*, 964 F.2d 1404, 1423 (4th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992); *Bunch v. Thompson*, 949 F.2d 1354, 1362-63 (4th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 3056, 120 L.Ed.2d 922 (1992); *Epperly v. Booker*, 235 Va. 35, 366 S.Ed.2d 62, 66-67 (1988). Thus, because there is a plain statement by the Virginia court that claims (B), (E), (F), (H), (J),

(K),[10] (M), (O), and (P) are barred on an independent and adequate state procedural ground, those claims will be barred from review by this Court, unless default of those claims is excused, which is the next subject the Court must undertake.[11]

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[10] For reasons discussed herein, the Court will reach the merits of this claim. *See infra* at 1423-24.

[11] The Virginia court alternately found that claims (B), (F), (H), (J), and (K) were also barred by the rule stated in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), which stands for the proposition that issues raised and resolved against the petitioner during the direct appeal process may not again be raised as grounds for collateral review. This would appear to result in a conflicted holding, because either Petitioner's claims were raised and dealt with on direct appeal so that they would be barred from collateral review under *Hawks*, or they were not raised on direct appeal, so that they could not then be raised for collateral review under *Slayton*.

This same argument was addressed before this Court in *Pruett v. Thompson*, 771 F.Supp. 1428, 1438-39 (E.D.Va.1991). This Court held there that these could merely be considered alternate holdings, and that they were therefore not in conflict. All that is necessary for an order to qualify as a "plain statement" under *Harris*, so that the order qualifies as a state procedural default barring further federal review, is that the "order show[] precisely how the Court dealt with the petition for appeal." *Coleman v. Thompson*, 895 F.2d 139, 143 (4th Cir.1990), *aff'd*, —— U.S. ——, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The Virginia Supreme Court's order here sufficiently satisfies this criteria. The April 30, 1991, order plainly states that "the petition for appeal is denied for reasons of procedural default."

This Court noted in *Pruett*, and apparently the Commonwealth of Virginia conceded this point in that case, that *Hawks* in fact cannot operate as a procedural bar preventing federal habeas corpus review. *Pruett*, 771 F.Supp. at 1438 n. 6. ("the *Hawks* rule does not bar this Court from considering those portions of petitioner's claims raised on direct appeal and at each level of the collateral proceeding"). Indeed, this would seemingly foreclose the opportunity for *any* collateral review.

Thus, because the *Hawks* rule is not necessary in this case, this opinion will rest its holding on the point of procedural bar solely on the assertion by the Virginia Supreme Court that the claims

2. Exceptions for Claims Otherwise Barred.

a. Cause and Prejudice.

Two exceptions exist to the rule that a federal court cannot review a habeas corpus claim defaulted on the basis of an independent and adequate state ground. The first is that a petitioner will be excused where he can show "just cause" for the state procedural default, and "prejudice" resulting therefrom.[12] *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Bassette*, 915 F.2d at 937. In the context of procedural default, the Supreme Court purposefully has refrained from defining what constitutes "just cause," recognizing there is a "broad range of potential reasons for an attorney's failure to comply with a procedural rule, and [a] virtually limitless array of contexts in which a procedural default can occur." *Reed v. Ross*, 468 U.S. 1, 13, 104 S.Ct. 2901, 2909, 82 L.Ed.2d 1 (1984). The Court stresses that

> [u]nderlying the concept of cause, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct.

Id. (citations omitted). As the Court explained in *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986),

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listed were barred on state procedural grounds under *Slayton*. *Hawks* is irrelevant for these purposes, as *Slayton* alone is adequate.

[12] The second ground for excusing a petitioner from default on procedural grounds is where enforcement of the default would result in a fundamental miscarriage of justice, because of a petitioner's "actual innocence." This aspect is discussed *infra* at 1428.

> we discern no inequity in requiring [the petitioner] to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.

Nevertheless, the Court in *Murray* was careful to point out that "[i]neffective assistance of counsel . . . is cause for a procedural default." *Id.* at 488, 106 S.Ct. at 2645.

Turner asserts here, as he did during state collateral proceedings, that to the extent any of his claims have been defaulted, this is the result of ineffective assistance of counsel. Thus, before any of Turner's claims can be held to have been defaulted, this Court must find that *each* allegedly defaulted claim did not occur as a result of ineffective assistance of counsel.[13]

i. Strickland Standard for Ineffective Assistance of Counsel.

Generally under 28 U.S.C. § 2254(d) (1988), factual determinations made by state courts are presumed correct. State court findings as to ineffective assistance of counsel, however, are mixed questions of law and fact, and are therefore not entitled to the same presumption. Thus, a state court finding "that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by [§ 2254(d)]." *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674 (1984); *see also Clozza v. Murray*, 913 F.2d 1092, 1100 (4th Cir.1990) (accord), *cert.*

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[13] This Court notes that any claim defaulted upon as a result of attorney error in the state collateral process cannot serve as "cause," because there is no right to counsel, effective or otherwise, during the collateral review process. *Coleman v. Thompson*, —— U.S. ——, ——, 111 S.Ct. 2546, 2566-68, 115 L.Ed.2d 640 (1991).

denied, —— U.S. ——, 111 S.Ct. 1123, 113 L.Ed.2d 231 (1991). Nevertheless, so far "as the state court's findings of historical fact bear on the question, they are presumed to be correct under the statute." *Clozza*, 913 F.2d at 1100. Thus, in reviewing this claim, the "Court must individually analyze each ineffective assistance of counsel claim and reach its own conclusion of law." *DeLong v. Thompson*, 790 F.Supp. 594, 601 (E.D.Va. 1991). It should be stressed, however, that there is no requirement that this Court hold an evidentiary hearing on the claimed ineffective assistance of counsel in order to resolve this matter. *Poyner v. Murray*, 964 F.2d 1404, 1421 (4th Cir.) (noting that no evidentiary hearing is required where petitioner "would not be entitled to relief on ineffective assistance grounds even if the facts were as he alleges"), *cert. denied*, —— U.S. ——, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992).

To state a claim for ineffective assistance of counsel under *Strickland*,[14] the petitioner must satisfy a two-pronged test. He must first show "counsel's performance was deficient" by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. To do this, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* Furthermore, "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . [T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might by considered sound trial strategy.'" *Id.* at 689, 104 S.Ct. at 2065 (citation omitted). Thus, the Court expressly has cautioned against "Monday-morning-quarterbacking" by federal

[14] The *Strickland* standard has been held to apply both to the actions of trial as well as appellate counsel. *Smith v. Murray*, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986); *Griffin v. Aiken*, 775 F.2d 1226, 1235-36 (4th Cir.1985), *cert. denied*, 478 U.S. 1007, 106 S.Ct. 3301, 92 L.Ed.2d 715 (1986).

courts when reviewing a trial attorney's choices, stating that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

Even if the first prong focusing on reasonably competent performance is satisfied, the petitioner must also show he was in fact prejudiced by counsel's deficient representation. *Id.* at 693, 104 S.Ct. at 2067. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068.

It is important for the Court to identify the specific nature of counsel's actions asserted to have been "ineffective" in this context. As will be recalled, the claims have been declared defaulted by the Virginia Supreme Court under the rule in *Slayton*. In other words, counsel is claimed to have been ineffective by failing to raise certain arguments on direct appeal, resulting in default of those arguments for purposes of collateral review. Thus, under *Strickland*, Petitioner must first show that failure to raise those arguments on appeal falls below an objective standard of reasonableness.[15]

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[15] In reality, this process forces the Court to assess the merits of each defaulted claim, in order to determine whether counsel's decision to forgo the claim on appeal was reasonable, and whether that decision actually would have changed the outcome of the appeal. Although this would appear to allow a defendant to make arguments under the Sixth Amendment otherwise barred on their merits, this is what the Supreme Court has declared a defendant is entitled to; namely, a constitutionally competent counsel who properly argues the defendant's case on appeal. *See Kimmelman v. Morrison*, 477 U.S. 365, 379-83 & n. 7, 106 S.Ct. 2574, 2585-87 & n. 7, 91 L.Ed.2d 305 (1986).

This creates an interesting paradox for federal courts when reviewing habeas corpus claims, in light of the fact that it is now

In examining whether the decision to forgo certain claims on appeal was reasonable, this Court is mindful of *Jones v. Barnes*, 463 U.S. 745, 746, 103 S.Ct. 3308, 3310, 77 L.Ed.2d 987 (1983), where the Supreme Court examined "whether defense counsel assigned to prosecute an appeal from a criminal conviction has a constitutional duty to raise every nonfrivolous issue requested by the defendant." In answering this question negatively, the Court observed that

> [e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:
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> "One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Jackson, Advocacy Before the United States Supreme Court, 25 Temple L.Q. 115, 119 (1951). . . . A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak con-

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common practice for habeas petitioners to assert cursorily, as Turner has here, that any claims barred for reasons of procedural default are the result of ineffective assistance. In order to determine whether the claim has been procedurally defaulted so that the Court would be precluded from reaching the claim's merits, the Court must first examine the merits, to determine whether that claim has been reasonably defaulted.

> tentions. . . . [*Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)] recognized that the role of the advocate "requires that he support his client's appeal to the best of his ability. . . ." For judges to secondguess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*. Nothing in the Constitution or our interpretation of that document requires such a standard.

Id. at 751-54, 103 S.Ct. at 3313-14 (citations omitted).[16]

The Court is also mindful of *Evans v. Thompson*, 881 F.2d 117, 124 (4th Cir.1989), *cert. denied*, 497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990), where the Fourth Circuit stated that when challenging trial or appellate counsels' effectiveness, Petitioner must "overcome the strong presumption that counsel's performance was reasonable." It is "sound trial strategy" for appellate counsel to "determine[] what he believe[s] to be petitioner's most viable arguments and raise[] them on appeal." *Id.*

Barnes and *Evans* make it clear a reasonable attorney can choose to forgo arguing a claim, even though that claim might have some chance of success, and even though the failure to present the claim will result in default. *Barnes* goes so far as to make it clear that in

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[16] The Court goes on in footnote seven to caution that it was not deciding the question of whether refusal to raise a requested claim could serve as "cause" to excuse a defaulted habeas corpus claim. *Barnes*, 463 U.S. at 754 n. 7, 103 S.Ct. at 3314 n. 7. As was discussed above, the Supreme Court has since answered that question affirmatively in *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). The holding in *Murray*, however, does not in any way detract from the Supreme Court's observations in *Barnes* as to what makes an appeal effective, and that counsel's decision to forgo colorable claims, even over a defendant's request, may be not only constitutionally reasonable, but desirable.

the views of the Supreme Court and other experts on appellate litigation, a constitutionally competent attorney will choose not to argue claims that on their face have some merit, if those arguments would detract from the defendant's strongest points. *Strickland* says this Court cannot second-guess counsel as to his prioritization of claims for appeal. Therefore, in examining the reasonableness of counsel's actions in discarding certain claims on appeal, resulting in their potential default, this Court must weigh counsel's decisions in light of *Strickland*'s caution that

> [j]udicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065 (citations omitted).

Even if the showing of unreasonableness is successful, under *Strickland* the petitioner must still demonstrate resulting harm. In this context, where Petitioner alleges he has been harmed because of counsel's failure to raise points on appeal, resulting in their procedural default, the Court cites the Supreme Court's reasoning in *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). In *Kimmelman*, the Supreme Court was presented with a defendant who claimed ineffective assistance because his counsel failed to litigate a Fourth Amendment claim, resulting in that claim's default. There the Court said

> [w]here defense counsel's failure to litigate a . . . claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his . . . claim is meritorious and that there is a reason-

> able probability that the verdict would have been different. . . .

Id. at 375, 106 S.Ct. at 2583.

Therefore, in order for Petitioner to show harm under *Strickland* and *Kimmelman* in this context, he must show the forsaken ground for appeal is meritorious, and that there is a reasonable probability that had counsel raised it, Petitioner's death sentence would have been reversed.

ii. Claim of Alleged Bias Resulting from Race, Gender, and Economic Status.

Having described the analytic framework, the Court now proceeds to an examination of potentially defaulted claims. In claim (B), Petitioner argues the Virginia death penalty statute is biased in terms of race,[17] gender, and economic status. In *McCleskey v. Kemp*, 481 U.S. 279, 291, 107 S.Ct. 1756, 1766, 95 L.Ed.2d 262 (1987), which was extent when Petitioner's counsel was formulating his arguments for direct appeal, the Supreme Court rejected a defendant's claim that the death penalty was unconstitutional because statistical studies showed "persons who murder whites are more likely to be sentenced to death than person who murder blacks, and black murderers are more likely to be sentenced to death than white murderers."

In rejecting the claim, the Court observed that

> the claim that [the death] sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups,

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[17] It appears that the issue of racial bias was raised properly on appeal, and therefore this claim could not be barred under the rule in *Slayton*. *See Turner II*, 364 S.E.2d at 490. This is, however, of no help to the Petitioner, as the issue must still be decided against him on the merits, and therefore his petition on this basis is denied. *See McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

> and even to gender. . . . Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey. The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.

Id. at 315-19, 107 S.Ct. at 1779-81.

Therefore, *McCleskey* cannot be limited solely to studies based on race. The Court's reasoning clearly would extend to a rejection of similar studies based upon gender or financial status. Thus, in light of *McCleskey*, it was entirely reasonable in the *Strickland* sense for Petitioner's counsel to forgo arguments based upon gender or financial status, as those arguments had no chance of succeeding, and would serve only to detract from stronger arguments. Furthermore, even if counsel should have raised these points, Petitioner was not prejudiced, because the issue clearly would have been decided against him under *McCleskey*. Because Petitioner has failed to meet the standard of *Strickland*, the actions of counsel in failing to raise this issue cannot serve as cause to excuse the procedural bar, and thus the claim remains procedurally beyond the reach of this Court under *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).[18]

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[18] As an alternative to the holding that Petitioner's claim is procedurally barred, this Court would nevertheless rule against Peti-

iii. Claimed Ineffective Assistance of Court Appointed Mental Health Expert.

In claim (E), Petitioner asserts that the mental health expert appointed to evaluate him for mitigation purposes, Dr. Brad Fisher, provided incompetent assistance. In *Ake v. Oklahoma,* 470 U.S. 68, 83-87, 105 S.Ct. 1087, 1096-98, 84 L.Ed.2d 53 (1985), the Supreme Court held that a capital defendant has the right to an examination by a psychiatrist for the sentencing phase when the State plans to present psychiatric evidence of the defendant's future dangerousness. At the time Petitioner's counsel was formulating arguments for appeal, the Virginia Supreme Court had interpreted *Ake* to mean that where the Commonwealth did *not* present psychiatric evidence of future dangerousness at sentencing, then accused would *not* have a right to a court-appointed psychiatrist. *Pruett v. Commonwealth,* 232 Va. 266, 351 S.E.2d 1, 7 n. 3 (1986), *cert. denied,* 482 U.S. 931, 107 S.Ct. 3220, 96 L.Ed.2d 706 (1987).

A review of the transcript shows the Commonwealth did not present any psychiatric evidence concerning Petitioner's future dangerousness, and as was noted previously, the defense rested without putting on a case. Therefore, a reasonable attorney under *Strickland* could have determined that to appeal on the basis of Dr. Fisher's performance would have been futile in two respects. First, the Virginia Supreme Court following *Pruett* would have said that because the Commonwealth had not introduced psychiatric evidence on future dangerousness, Petitioner had no right to a psychiatrist, competent or otherwise. Second, in the view of a reasonable attorney, the Virginia Court might also have found any failure by Dr. Fisher to have been harmless error, because the jury convicted solely on the basis of "vileness," and Dr. Fisher's testimony would not have detracted from the factual vileness of Petitioner's

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tioner on the merits. *McCleskey,* 481 U.S. at 315-19, 107 S.Ct. at 1779-81; *Briley v. Booker,* 746 F.2d 225, 227 (4th Cir.1984).

crime. For these same reasons, even if counsel should have raised the issue of Dr. Fisher on appeal, that failure did not prejudice Petitioner because it would not have resulted in a reversal. Therefore, because counsel's failure to raise the issue of Dr. Fisher on appeal was not ineffective or prejudicial under *Strickland*, Petitioner has failed to show cause for excusing default of this issue due to his attorney's failure to raise it on direct appeal, and it remains barred from review by this Court.[19]

iv. Claimed Unconstitutionality of Virginia's Proportionality Review.

Petitioner's claim (F) alleges that Virginia's proportionality review, mandated under Va.Code Ann. § 17-110.1(C) (Michie 1992),[20] is constitutionally inadequate. Petitioner wishes to argue the statutory review scheme is unconstitutional because it fails to require comparison of his case with other cases where a life imprisonment sentence was imposed.

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[19] As an alternative to the finding that this claim is procedurally barred from review, this Court would also rule against Petitioner on the merits of the claim. *See Waye v. Murray*, 884 F.2d 765, 767 (4th Cir.1989) ("To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of a fair trial and the constitution require."); *Pruett v. Thompson*, 771 F.Supp. 1428, 1442 (E.D.Va. 1991) (claimed denial of competent psychiatric evaluation is without legal merit).

[20] The statute provides in pertinent part that the court shall consider and determine:

> 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Va.Code Ann. § 17-110.1(C) (Michie 1992).

At the time Petitioner's counsel was formulating his appeal, it was the rule in Virginia, and has continued to be, that the required comparison is whether " 'juries in [Virginia] generally approve the supreme penalty for comparable or similar crimes.' " *Townes v. Commonwealth,* 234 Va. 307, 362 S.E.2d 650, 668 (1987) (quoting *Stamper v. Commonwealth,* 220 Va. 260, 257 S.E.2d 808, 824 (1979), *cert. denied,* 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980)), *cert. denied,* 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988); *see also Stamper,* 257 S.E.2d at 824 ("The test is not whether a jury may have declined to recommend the death penalty in a particular case but whether generally juries in [Virginia] impose the death sentence for conduct similar to that of the defendant."); *King v. Commonwealth,* 243 Va. 353, 416 S.E.2d 669, 679 (accord), *cert. denied,* —— U.S. ——, 113 S.Ct. 417, 121 L.Ed.2d 340 (1992). Thus, the Virginia Supreme Court interprets the statute to require only a comparison with death sentence cases, rather than also requiring comparison with life imprisonment cases.

In *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), the United States Supreme Court held that a state's capital sentencing procedure may be constitutional despite the fact that the state does not require any so-called proportionality review whatsoever. Given that proportionality review is not constitutionally required, it cannot be argued that Virginia's scheme is unconstitutional simply because the relevant comparison has been limited to death cases. Indeed, this is how the rule had been consistently interpreted by the Virginia Court at the time of Petitioner's appeal. Therefore, Petitioner's counsel was not unreasonable for failing to raise this argument, as it would have been a weak argument at best. Additionally, Petitioner was not prejudiced by counsel's failure to raise the argument, as it most likely would have been decided against him. Therefore Petitioner's claim remains procedurally barred from review by this Court, as he has failed to show the required cause and

prejudice for excusing that bar based upon his appellate counsel's alleged incompetence.[21]

v. Virginia Capital Statute's Alleged Vagueness and Overbreadth.

Claim (H),[22] which is Petitioner's next potentially defaulted claim, alleges that Va.Code Ann. 19.2-264.2 (Michie 1992),[23] is unconstitutional on its face and as applied because of vagueness and overbreadth. At the time of Petitioner's direct appeal, this challenge consistently had been rejected by the Virginia Supreme Court. *See, e.g., Gray v. Commonwealth,* 233 Va. 313, 356 S.E.2d 157, *cert. denied,* 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987); *Evan v. Commonwealth,* 222 Va. 766, 284 S.E.2d 816 (1981), *cert. denied,* 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *Briley v Commonwealth,* 221 Va. 563, 273 S.E.2d 57 (1980); *Smith v. Commonwealth,* 219 Va. 455, 248 S.E.2d 135, 148 (1978), *cert. denied,* 441 U.S. 967, 99 S.Ct. 2419, 60

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[21] Alternatively, the Court would nevertheless resolve Petitioner's claim against him on the merits, given that the Constitution does not require *any* proportionality review, much less the kind that Petitioner would prefer. *See Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *Clozza v. Murray,* 913 F.2d 1092, 1105 (4th Cir.1990) ("we doubt that the claim has even colorable merit as facially stated"), *cert. denied,* —— U.S. ——, 111 S.Ct. 1123, 113 L.Ed.2d 231 (1991); *Peterson v. Murray,* 904 F.2d 882, 887 (4th Cir.), *cert. denied,* 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990).

[22] It may be that this claim at least in part is not procedurally barred under *Slayton,* in that several vagueness arguments were made by the Petitioner, and resolved against him, on direct appeal. *See Turner,* 364 S.E.2d at 488. The Commonwealth concedes that arguments previously made are not barred, but that any new arguments Petitioner attempted to assert were those barred by the Virginia Supreme Court under *Slayton.* To the extent that the claim should be reviewed by this Court, the claim nevertheless is resolved against the Petitioner on the merits. *See infra* note 24.

[23] The relevant portion of the statute is quoted *infra* at 1428-29.

L.Ed.2d 1074 (1979). Indeed, the Virginia court has continued to reject such challenges. *See, e.g., Mueller v. Commonwealth,* 244 Va. 386, 422 S.E.2d 380, 385 (1992).

In light of the Virginia Supreme Court's consistent rejection of Petitioner's challenges to the statutory scheme, it was not unreasonable for his counsel to forgo such arguments in formulating issues for appeal, as such arguments were weak, and would have detracted from other stronger arguments. Furthermore, there could be no prejudice resulting from waiver of these arguments, as they would have been resolved against Petitioner even if raised. Thus, Petitioner has again failed to show cause or prejudice based on his appellate counsel's performance, and this claim remains procedurally barred from review.[24]

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[24] As with Petitioner's other procedurally defaulted claims, the Court alternatively finds against him on the merits. *See Lewis v. Jeffers,* 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (a state appellate court may rely upon an adequate narrowing construction of the assertedly vague factor in order to cure the error of vagueness); *Bunch v. Thompson,* 949 F.2d 1354, 1367 (4th Cir. 1991), *cert. denied,* —— U.S. ——, 112 S.Ct. 3056, 120 L.Ed.2d 922 (1992); *Jones v. Murray,* 947 F.2d 1106, 1116-19 (4th Cir. 1991), *cert. denied,* —— U.S. ——, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992); *Clozza v. Murray,* 913 F.2d 1092, 1105 (4th Cir.1990), *cert. denied,* —— U.S. ——, 111 S.Ct. 1123, 113 L.Ed.2d 231 (1991); *Giarratano v. Procunier,* 891 F.2d 483, 489-90 (4th Cir. 1989), *cert. denied,* 498 U.S. 881, 111 S.Ct. 222, 112 L.Ed.2d 178 (1990); *Turner v. Bass,* 753 F.2d 342, 350-53 (4th Cir.1985), *rev'd on other grounds sub nom. Turner v. Murray,* 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); *Briley v. Bass,* 750 F.2d 1238, 1245 (4th Cir.1984), *cert. denied,* 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985).

Petitioner cites to the recent case of *Richmond v. Lewis,* —— U.S. ——, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992), where the Supreme Court addressed similar vagueness concerns in Arizona's statutory scheme. Contrary to Petitioner's view, *Richmond* is of no help to him. Although the Court did observe that the " 'especially heinous, cruel or depraved' " language employed by the Arizona statute was unconstitutionally vague on its face, the Court nevertheless noted that a facially vague statute can be cured when given

vi. Claim Regarding Allegedly Problematic Jury Instructions on Aggravating Circumstances and Mitigating Evidence.

In claim (J), Petitioner asserts that the trial court failed to instruct the jury adequately concerning aggravating circumstances and use of mitigating evidence. Specifically, Petitioner seeks to challenge (i) the adequacy of instructions relating to vileness and aggravated battery;[25] (ii) the instruction offered concerning "depravity of mind";[26] (iii) the failure to instruct the jury concerning the definition, use, and function of mitigating evidence;[27] and finally,

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an adequate narrowing construction. *Id.* at ——, 113 S.Ct. at 534 (quoting Ariz. Rev.Stat.Ann. § 13-703(F)(6) (1989), and citing *Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990)). Because the Virginia statute has been adequately narrowed, it survives this constitutional challenge, and *Richmond* is inapposite. *See Jones*, 947 F.2d at 1117 (noting that the Virginia statute has been given the appropriate limiting constructions and citing cases).

[25] As to vileness, the jury was instructed in pertinent part that

> [b]efore the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt . . . (2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim.

Turner II, Jury Instruction No. 1. Aggravated battery was defined as "a battery which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder." *Turner II*, Jury Instruction No. 10.

[26] Depravity of mind was defined as "a degree of moral turpitude and [] psychical debasement surpassing that inherent in the definition of ordinary legal debasement and premeditation." *Turner II*, Jury Instruction No. 11.

[27] The jury was instructed

> that in determining whether to sentence Willie Turner to life imprisonment in the penitentiary or to death, you shall consider the circumstances surrounding the offense, the history and background of Willie Turner, and any other facts of the offense. You should consider those characteristics of the defendant which may be considered as extenuating or reducing

(iv) the court's failure to instruct jurors that the existence and consideration of mitigating factors need not be unanimous.

At the time Petitioner's counsel was formulating arguments for appeal, the Virginia Supreme Court had already addressed the concerns raised by (i) and (ii) above in *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, 148-49 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). There the Virginia high court had defined "vileness," "aggravated battery," and "depravity of mind" almost exactly as the trial court did in the complained of instructions. *Id.* at 149. At the time of Petitioner's direct appeal, the *Smith* reasoning or similar instructions had received the Virginia Supreme Court's continual support. *See, e.g., Wise v. Commonwealth*, 230 Va. 322, 337 S.E.2d 715, 723 (1985), *cert. denied*, 475 U.S. 1112, 106 S.Ct. 1524, 89 L.Ed.2d 921 (1986); *Boggs v. Commonwealth*, 229 Va. 501, 331 S.E.2d 407, 421-22 (Va.1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 347 (1986); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815, 831-33 *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985); *Edmonds v Commonwealth*, 329 S.E.2d 807, 814 (Va.), *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985); *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554, 564-66 (1984), *cert. denied*. 472 U.S. 1012, 105 S.Ct. 2713, 86 L.Ed.2d 728 (1985); *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371, 386 *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271, 281-85 & nn. 2-3, *cert. denied*, 464 U.S. 977, 104 S.Ct. 414, 78 L.Ed.2d 352 (1983); *LeVasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644, 659 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79

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the degree of moral culpability or blame and which therefore may call for the imposition of a punishment less than death.

Turner II, Jury Instruction No. 7.

L.Ed.2d 202 (1984); *Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57, 65-67 (1980).

Based upon the overwhelming rejection by the Virginia Supreme Court of arguments concerning instructions or definitions relating to the phrases "vileness," "aggravated battery," and "depravity of mind," Petitioner's counsel was reasonable not to make the now proffered arguments, in that these relatively weak arguments would have further detracted from the strength of his appeal.[28]

Furthermore, based upon the Virginia Supreme Court's continual reliance on *Smith*, and instructions comporting with it, Petitioner cannot be said to have been prejudiced by his counsel's failure to raise these arguments on appeal, as there is no chance the outcome would have been different. *See Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380, 385, 395-96 (1992); *Thomas v. Commonwealth*, 244 Va. 1, 419 S.E.2d 606, 619-20, *cert. denied*, ——U.S. ——, 113 S.Ct. 421, 121 L.Ed.2d 343 (1992); *Davidson v. Commonwealth*, 244 Va. 129, 419 S.E.2d 656, 659-60 *cert. denied*, —— U.S. ——, 113 S.Ct. 423, 121 L.Ed.2d 345 (1992); *Barnes v. Commonwealth*, 234 Va. 130, 360 S.E.2d 196, 201-02 (1987), *cert. denied*, 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988).

It can also be observed that based upon Virginia and United States Supreme Court precedent at the time of the direct appeal, Petitioner's counsel was also reasonable for declining to raise patently weak arguments concerning the instruction given on mitigating evidence, because arguments of this type consistently had been rejected and would have weakened the rest of the appeal. Petitioner was likewise not prejudiced, as seen by rejection of such

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[28] It is apparent that counsel did in fact raise other arguments concerning these phrases and instructions, *see Turner*, 364 S.E.2d at 488-90, which shows that appellate counsel did address these terms, and made what he reasonably believed were his strongest objections. Under *Strickland*, the Court cannot second-guess these reasonable choices.

arguments in subsequent holdings, so that even had the arguments been raised, a reversal on this basis would have had a remote chance at best.[29]

Finally, as to Petitioner's argument that there should have been an instruction stating that unanimity was unnecessary for mitigating factors, at the time of Petitioner's appeal this argument had been rejected by the Virginia Supreme court. *See Clark v. Commonwealth,* 220 Va. 201, 257 S.E.2d 784, 791 (1979) ("Such an instruction is unnecessary and would have been confusing."), *cert. denied,* 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980). Thus, counsel was reasonable for failing to argue a point already rejected. Furthermore, there was no prejudice to Petitioner for counsel's failure, in that the argument would not have been successful. *See Gray v. Commonwealth,* 233 Va. 313, 356 S.E.2d 157, 178, *cert. denied,* 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987).

Therefore, because Petitioner has failed to show either cause or prejudice based upon his appellate counsel's

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[29] *See Zant v. Stephens,* 462 U.S. 862, 873-80, 890, 103 S.Ct. 2733, 2741-44, 2750, 77 L.Ed.2d 235 (1983) (the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances); *Mueller,* 422 S.E.2d at 396-97; *Yeatts v. Commonwealth,* 242 Va. 121, 410 S.E.2d 254, 268 (1991) (it is assumed that the jury follows instruction to consider mitigating evidence), *cert. denied,* —— U.S. ——, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992); *Mackall v. Commonwealth,* 236 Va. 240, 372 S.E.2d 759, 770 (1988) (trial court need not offer instruction singling out mitigation evidence for special emphasis, or stating that a mitigating circumstance need not be proven beyond reasonable doubt), *cert. denied,* 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989); *Watkins v. Commonwealth,* 229 Va. 469, 331 S.E.2d 422, 438 (1985), *cert. denied,* 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986); *LeVasseur,* 304 S.E.2d at 660-61 & n. 5 (same as *Mackall*); *Waye v. Commonwealth,* 219 Va. 683, 251 S.E.2d 202, 212 (1979) (leaving discretion with the jury in how to consider and weigh mitigating and aggravating factors is not unconstitutional), *cert. denied,* 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979).

choices in formulating the appeal, these claims remain barred from review by this Court on procedural grounds.[30]

vii. Claimed Insufficiency of Evidence Showing "Vileness."

In claim (K), Petitioner states that the trial court erred in permitting the jury to impose death based upon a finding that his conduct was "outrageously or wantonly vile, horrible or inhuman." Petitioner in essence seeks to argue that the facts of this case are insufficient to show "vileness," because the facts do not show an "aggravated battery" or "depravity of mind." Therefore, Petitioner claims it was error to instruct the jury concerning the Virginia statute's vileness component.[31]

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[30] As with Petitioner's other procedurally defaulted claims, the Court alternatively decides against the Petitioner on the merits when reviewing the jury instructions as a whole, and finding the instructions to be constitutionally sufficient based upon the cases addressing these arguments. *See Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (upholding Pennsylvania death penalty system against similar challenges); *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (upholding Texas death sentence against similar challenges); *Zant v. Stephens*, 462 U.S. 862, 873-80, 890, 103 S.Ct. 2733, 2741-44, 2750, 77 L.Ed.2d 235 (1983); *Jones v. Murray*, 947 F.2d 1106, 1116-20 (4th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992); *Clozza v. Murray*, 913 F.2d 1092, 1103-05 (4th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1123, 113 L.Ed.2d 231 (1991); *Peterson v. Murray*, 904 F.2d 882, 888-89 (4th Cir.), *cert. denied*, 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990); *Boggs v. Bair*, 892 F.2d 1193, 1197 (4th Cir.1989), *cert. denied*, 495 U.S. 940, 110 S.Ct. 2193, 109 L.Ed.2d 521 (1990); *Smith v. Procunier*, 769 F.2d 170, 173-74 (4th Cir.1985), *aff'd*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); *Turner v. Bass*, 753 F.2d 342, 353 (4th Cir.1985), *rev'd on other grounds sub nom. Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); *Briley v. Bass*, 750 F.2d 1238, 1242-45 (4th Cir.1984), *cert. denied*, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985).

[31] Petitioner also makes the following claim:

> The *United States Supreme Court*, construing the same aggravating circumstance in *Godfrey v. Georgia*, 446 U.S. at 431

Although Petitioner failed to raise this claim on direct appeal, it is apparent that in discussing Petitioner's vagueness claims the Virginia Supreme Court found the evidence sufficient to establish aggravated battery and depravity of mind, meeting the statutory test for "vileness." *See Turner II*, 364 S.E.2d at 488-89. Therefore, because the issues Petitioner now attempts to raise actually were reached by the state court, it does not offend comity or the principles of federalism for this Court also to reach the merits of this aspect of Petitioner's claim. *Cf. Briley v. Bass*, 750 F.2d 1238, 1242 n. 6 (4th Cir.1984) (federal court could reach the merits of a claim potentially barred on state procedural grounds where the state court actually reached the claim's merits on collateral review), *cert. denied*, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985).

> [100 S.Ct. 1759, 1766, 64 L.Ed.2d 398 (1980)] *held that* the terms "torture," "depravity of mind" and "aggravated battery" *must be read in pari materia*, so that if there was no aggravated battery, or if the battery was not one which demonstrated depravity of mind, the death sentence could not be imposed pursuant to that aggravating criterion.

Petition at ¶ 319 (emphasis added).

In *Godfrey*, the United States Supreme Court was discussing whether the Georgia capital sentencing statute had been appropriately limited by the Georgia courts. In this context, the United States Supreme Court noted that the *Georgia Supreme Court* had held in *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977), that "the word, 'torture,' must be construed *in pari materia* with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death." *Godfrey*, 446 U.S. at 431, 100 S.Ct. at 1766. Thus, the United States Supreme Court merely was reviewing the holdings of the Georgia Court. In no way can this opinion be construed in the way that Petitioner's counsel argues; it is *not* a holding of the United States Supreme Court, it is an observation of how the Georgia court had been construing that state's statute. There is absolutely no support for the proposition that the United States Supreme Court was requiring the rest of the states to adopt that construction, as Petitioner (or more accurately his counsel) would have this Court believe. Therefore, Petitioner's claim on this basis is meritless.

Turning then to the merits, this Court holds that based on its own independent examination of the record

> the murder here was cold-blooded and calculated. . . . Turner initially shot Smith for no reason at all. While Smith lay alive but helpless and while Officer Bain pleaded, Turner fired two shots into Smith's chest after stating that he was going to kill him for snitching on him. . . . We reject Turner's contention that his crime was not so vile as to justify the imposition of death. The case fits within the constitutionally limited construction of the vileness criterion established by the Virginia Supreme Court, and we are of opinion Virginia's death penalty provisions were constitutionally applied.

Turner v. Bass, 753 F.2d 342, 353 (4th Cir.1985), *rev'd on other grounds sub nom. Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986).[32] Accordingly, this portion of Petitioner's claim is denied on the merits.

viii. Claimed Error in Exclusion of Jurors.

Returning to an examination of claims potentially barred on procedural grounds unless Petitioner can establish cause due to ineffective assistance of counsel, in claim (M), Petitioner seeks to argue that jurors Deborah Calhoun and Delphine Freeman were removed from the panel improperly. At the time Petitioner's counsel was formulating arguments for appeal, the law was (and is) that a juror could not be excluded merely because of conscientious scruples over capital punishment unless that "juror's

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[32] Although the Court repeats the language of the Fourth Circuit in finding that Petitioner's crime meets the Virginia test for vileness, this should not be construed to imply that the Court is simply adopting the prior holding. As is made clear by the length of this opinion, and frequent citations to the record, the Court has conducted a thorough and independent examination of the record, and concludes on that basis that because the facts of Petitioner's crime remain unchanged, they still support a finding of vileness.

views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980), and expanding on the Court's previous holding in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)). The Supreme Court stressed, however, that "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law," so that "this is why deference must be paid to the trial judge who sees and hears the juror." *Id.* at 425-26, 105 S.Ct. at 853.

Thus, in keeping with this observation, the Virginia Supreme Court had held at the time of Petitioner's direct appeal, and has continued to hold, that the determination of whether a juror can be stricken for cause is committed to the trial judge's sound discretion, and would not be reversed but for manifest error. *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202, 206, *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979); *George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12, 19 (1991) (showing continued deference to trial judge's determinations as to a juror's qualifications), *cert. denied*, —— U.S. ——, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992); *see also Boggs v. Commonwealth*, 229 Va. 501, 331 S.E.2d 407, 418 (1985) (in reviewing a juror's answers on voir dire, the "entire *voir dire* rather than the single question and answer" must be examined), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 347 (1986); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815, 824-26 (discussing Virginia application of the juror exclusion standard), *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985); *LeVasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644, 650 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984).

In order to determine whether counsel was reasonable in deciding not to appeal exclusion of jurors Calhoun and Freeman, the Court must examine the record confronting counsel. When Ms. Calhoun was asked "if the evidence is sufficient to justify the death penalty, can you vote for it," she responded "No, sir . . . I just don't believe in giving the death penalty." When asked whether she could "think of a circumstance under which [she] would give the death penalty," she answered "No, sir." When Snook attempted to rehabilitate her on cross, he asked her if, after hearing all the evidence and receiving the judge's instructions on the law, she could "see any circumstances under which [she] might come back with a verdict of death," to which she again answered "No," whereupon the court excused her. *Transcript I*, supra note 2, at 194-96.

Mrs. Freeman similarly was asked, "In a given case in which the evidence does justify that a sentence of death be imposed, can you say I send that man to the electric chair," to which she replied "No, I couldn't." When asked if that was "an absolute belief," she responded "Yes." When Snook attempted to rehabilitate her, he asked if she "would be able if the facts justified it, to come back with a verdict of death," to which she again stated "No, I wouldn't, you know." Snook then said, "Not under any circumstances," to which she responded "No," and was excused. *Id.* at 151-54.

Given these colloquies, counsel reasonably could have determined there was little to no chance of making a winning argument on appeal concerning exclusion of these jurors. Both jurors agreed they could not think of *any* circumstance under which they would impose the death penalty, which easily supports exclusion under the *Witherspoon/Witt* standard. In addition, counsel also reasonably could have concluded his best argument over jury selection concerned juror Samuel Lambert,[23] so that raising

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[23] *See infra* at 1434-35.

relatively weak arguments regarding jurors Calhoun and Freeman would only detract from the strength of that argument.

In addition, given the statements of these jurors coupled with the applicable highly deferential standard of review, Petitioner was not prejudiced by counsel's failure to raise this argument on appeal, as it most certainly would have been decided against him. Therefore, this Court holds that Petitioner has failed to meet the standard under *Strickland* concerning his appellate counsel's failure to raise this point on direct appeal, and thus he has failed to show cause for excusing the procedural bar. Accordingly, this Court cannot reach the merits of this claim, as the procedural bar remains in force.[34]

ix. Claim Regarding Evidence of an Unconstitutional Prior Conviction.

Petitioner's next claim potentially defaulted on procedural grounds due to counsel's failure to raise the issue on appeal is claim (O), which states that improper evidence of an unconstitutional prior conviction was allowed

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[34] Alternatively, the Court holds that Petitioner's claim on this ground must be denied on its merits. In addition to the reasoning discussed in the text in the context of appellate counsel's decision, the Court further observes that in the context of a habeas corpus petition filed under 28 U.S.C. § 2254(d), the trial judge's determination is presumed correct where there is fair support in the record, and this presumption applies to decisions by the trial court as to which jurors should be stricken. *Wainwright v. Witt*, 469 U.S. at 426-35, 105 S.Ct. at 853-58; *Briley v. Bass*, 750 F.2d at 1246-47 (citing *Patton v. Yount*, 467 U.S. 1025, 1036-40, 104 S.Ct. 2885, 2891-93, 81 L.Ed.2d 847 (1984)).

The record here more than supports the trial judge's determination to excuse these jurors for cause under the *Witherspoon/Witt* standard. Both jurors made it clear that under no circumstance would they be able to impose the death penalty. Even if the trial judge were entitled to no deference whatsoever, the record standing alone supports the exclusion of these jurors under the *Witherspoon/Witt* criteria, and Petitioner's claim must fail.

to be presented. As part of its case, the Commonwealth did indeed present evidence that on March 21, 1974, Petitioner was convicted in Powhatan Circuit Court of second degree murder. *Transcript I*, supra note 2, at 234, 374-75. The trial for this murder, the killing of a fellow inmate by Turner while he was also incarcerated, occurred within Powhatan Correctional Center, a procedure later declared unconstitutional by the Virginia courts as a violation of the defendant's right to a public trial. *See Vescuso v. Commonwealth*, 5 Va.App. 59, 360 S.E.2d 547 (1987) (en banc).

Vescuso was decided on September 15, 1987. *Id.* Yet Petitioner's resentencing trial ended on January 12, 1987. At the time of trial, as well as for the period during which counsel would have been formulating arguments for appeal, the law in Virginia was *Dammerau v. Commonwealth*, 3 Va.App. 285, 349 S.E.2d 409 (1986), which had upheld a trial staged within the confines of a correctional center. Although it is certainly a closer question given that *Dammerau* ultimately was reversed, this Court finds that under the deferential standard of *Strickland*, counsel was not unreasonable for failing to raise an argument for appeal that had existing precedent standing solidly against it. Counsel reasonably could have surmised, given that the Virginia Supreme Court had indicated no displeasure with the *Dammerau* holding by the Virginia Court of Appeals, that the argument presented little chance of success, and would have weakened the appeal by detracting[35] from relatively stronger arguments.

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[35] Raising this argument, as with all of the arguments not raised on appeal, would have detracted from Petitioner's appeal in at least two ways, either of which would serve as a reasonable consideration under *Strickland* for counsel's decision to forego them. First, the time that counsel would have had to invest in researching and preparing this argument for appeal would certainly have been substantial, in light of the existing precedent against it. This

Although it is apparent to this Court that a credible argument can be made to the effect that counsel might have gambled the other way, this is the type of second-guessing which *Strickland* prohibits. Therefore, because this Court finds that counsel's failure to raise this argument was constitutionally reasonable, Petitioner has failed to show cause for excusing the resulting procedural bar. Accordingly, this Court cannot review the claim on its merits, and Petitioner's claim on this ground is denied.

x. Claim of Unconstitutional Exclusion from Various Stages of Resentencing.

The final claim potentially barred from review on procedural grounds is claim (P), where Petitioner alleges he was excluded from critical stages of resentencing. The factual basis of this claim stems from Petitioner's absence from certain pretrial proceedings occurring on September 11,[36]

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necessarily would have channeled counsel's limited resources away from other arguments he could have reasonably felt were more worthy of his efforts, particularly because of the limited amount of time he had to formulate his grounds for appeal. Second, counsel could also have surmised that the chances for reversal on this ground were so remote, that raising the issue for the Supreme Court would only have served to distract them both at oral argument and in reviewing the briefs from arguments having a better chance of succeeding.

[36] The issues addressed at this conference included argument on whether the defendant was entitled to a life sentence based upon various legal arguments that the Virginia statute was unconstitutional, *see Commonwealth v. Turner*, No. 870554, Tr. at 1-16 (Southampton County Cir.Ct. Sept. 11, 1986); discussions involving discovery and scheduling for pretrial procedures, *id.* at 17-29; granting of defendant's motion for the appointment of mental health expert Dr. Brad Fisher, *id.* at 29-43; and discussion of defendant's motion for a change of venue, which was taken under advisement by the court, and ultimately granted. *Id.* at 43-49.

November 12,[37] November 25,[38] and December 10[39] of 1986, as well as from various hearings and conferences

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[37] The issues addressed at this conference included discovery issues, *see Commonwealth v. Turner*, No. 870554, Tr. at 1-19 (Southampton County Cir.Ct. Nov. 12, 1986); and a general discussion relating to Turner's status as a death row inmate. It should be noted that the court did not take any evidence at this hearing, and did not exclude any evidence. The court and counsel merely observed that because of the nature of the evidence, it would not be possible to keep the jury from learning of the fact that Turner had been on death row. There was *no* ruling on admissibility made. *See id.* at 20-24.

[38] The issues addressed during this pretrial conference were related to discovery and the defense's stipulation that the Commonwealth would not need to call a record keeper when presenting record of a prior conviction in Massachusetts, *see Commonwealth v. Turner*, No. 870554, Tr. at 109 (Southampton County Cir.Ct. Nov.25, 1986); a discussion as to whether the Commonwealth would need to take further action regarding the bill of particulars, *see id.* at 9-15; the granting of defendant's motion for a private investigator, limited solely to the investigation of prospective jurors, *see id.* at 15-17; the provisional granting of defendant's request for a copy of the Commonwealth's mental health expert's report, *if* an examination was made anytime before trial, *id.* at 18-20; the granting of defendant's request for a pre-trial instruction to prospective jurors informing them of Petitioner's prior death sentence, *see id.* at 20-26; clarification of voir dire procedure and trial procedure, *id.* at 27-28; and discussion of the need for a further conference and clarification of other procedures, *see id.* at 28-30.

[39] At this conference the parties discussed problems with the report of the defense's mental health expert, agreeing that if he subsequently made any diagnosis that the Commonwealth would be entitled to a copy of his report at that time, *see Commonwealth v. Turner*, No. 870554, Tr. at 1-29 (Southampton County Cir.Ct. Dec. 10, 1986); and the granting of the Commonwealth's motion for an order requiring the defendant to submit to a mental examination by state doctors. *Id.* at 29-34.

during trial on January 9[40] and 12,[41] 1987.

At the time of his appeal, the case law in Virginia concerning a prisoner's Sixth Amendment right to be present, as well as his parallel state right under Va.Code Ann. § 19.2-259 (Michie 1992), was that

> one tried for a felony has the right to be personally present during the trial. . . . Generally stated, the rule is that he must be present on his arraignment, when any evidence is given or excluded, when the jury is charged, when the trial court wishes to communicate with the jury in answering questions by them, and when the jury receives further instructions.

Palmer v. Commonwealth, 143 Va. 592, 130 S.E. 398, 402 (1925); *see also Quintana v. Commonwealth,* 224 Va. 127, 295 S.E.2d 643, 652 (1982) (quoting *Palmer*), *cert. denied,* 460 U.S. 1029, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983).

The right to be present was not construed, however, to extend under Virginia law to a conference held in chambers five days before trial on the defendant's motion for a Spanish-speaking psychiatrist. *See Quintana,* 224 Va. 127, 295 S.E.2d at 652. Nor did it extend to a conference in chambers on "a purely legal question" concerning admissibility of evidence, where the official ruling on admissibility "was actually made in open court in [the defendant's]

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[40] *See Transcript I,* supra note 2, at 434-37 for the record of what took place during this conference. The issue was related solely to whether the Court would allow the defendant to present the expert testimony of a psychologist from Mecklenburg named Dr. George. The Court stated that the witness would be allowed to testify, but that the Commonwealth would be permitted discovery of her records if she did.

[41] *See Transcript I,* supra note 2, at 454-65 for the record of this discussion. Defense counsel had asked for an in camera conference in order to discuss the scope of rebuttal that the Commonwealth would be allowed if the defense put on its case. The court expressly stated that it was not making a ruling on the scope of the rebuttal, and that it could not do so until the evidence was actually taken in court. *Id.* at 460, 463.

presence and objections and exceptions there taken" so that "[n]othing was done in the absence of the accused that could affect his interest." *Williams v. Commonwealth*, 188 Va. 583, 50 S.E.2d 407, 411 (1948).

Furthermore, the Virginia Court had held this right could be waived if, during the trial, evidence taken in violation of the right was introduced by the defendant's counsel while the defendant was present, with the defendant failing to object at that time. *Bilokur v. Commonwealth*, 221 Va. 467, 270 S.E.2d 747, 751-52 (1980); *see also Jones v. Commonwealth*, 227 Va. 425, 317 S.E.2d 482 (1984) (waiver of right to be present when jury viewed scene found where defendant expressly declined to attend); *Quintana*, 295 S.E.2d at 651-52 (right to be present at trial can be waived by persistent disruptive conduct).

Under *Strickland*, counsel reasonably could have concluded that under Virginia case law the defendant's presence was not required during any of the complained of discussions. No evidence was taken, and none was excluded. Other matters involved purely legal issues. Nothing took place that under *Palmer*, *Williams*, or *Quintana* would have required Petitioner's presence. Therefore counsel reasonably could have concluded that because this argument had little to no chance of success before the Virginia Supreme Court, to raise the argument would only weaken the appeal, and detract from more meritorious arguments. Similarly, in view of the relevant case law it cannot be said that Petitioner was prejudiced by counsel's failure to raise this argument. Thus, failure to appeal on this ground falls within the scope of reasonableness required under *Strickland*. Accordingly, because Petitioner has failed to show that counsel's performance was deficient in this regard, or that there was resulting prejudice, he has failed to show cause for relief from the resulting procedural bar, and the Court remains prohibited from reviewing the claim on the merits.[42]

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[42] Alternatively, the Court would hold that the Petitioner had no constitutional right to be present at any of these proceedings, or

b. Fundamental Miscarriage of Justice Based Upon Actual Innocence.

In addition to being excused from procedural default based on a showing of cause and prejudice, Petitioner will also be excused where failure to consider the claim would result in a " 'fundamental miscarriage of justice.' " *Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989); *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649-50, 91 L.Ed.2d 397 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135, 102 S.Ct. 1558, 1576, 71 L.Ed.2d 783 (1982)). An example of this exists where the petitioner alleges that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496, 106 S.Ct. at 2649.[43]

Actual innocence in the context of the death penalty can also refer to the concept that despite the defendant's unquestioned guilt of the underlying crime, as in this case, he may be nevertheless actually innocent of the death penalty. *Sawyer v. Whitley*, —— U.S. ——, ——, 112 S.Ct. 2514, 2521, 120 L.Ed.2d 269 (1992); *Murray*, 477 U.S. at 538, 106 S.Ct. at 2668. The Supreme Court has held that to show "actual innocence" in this context, Petitioner "must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, —— U.S. at ——, 112 S.Ct. at 2517. This exception is, however, a narrow one, and "must focus on

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that to the extent that any existed, it was waived by Petitioner's failure to object.

[43] The Court notes in passing that there is no claim of actual innocence in terms of the underlying factual allegations against the Petitioner, and thus the Court is not dealing with the potentially problematic situation presented where someone sentenced to death presents a belated claim of being actually innocent of having committed the crime for which they were sentenced. *See Herrera v. Collins*, —— U.S. ——, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), *aff'g* 954 F.2d 1029 (5th Cir.1991).

those elements which render a defendant eligible for the death penalty, *and not on additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error.*" *Id.* at ——, 112 S.Ct. at 2523 (emphasis added).

The Court holds that Petitioner has failed to meet this standard, and thus he has failed to show existence of a fundamental miscarriage of justice that would allow the Court to reach the claim's merits. This Court finds a reasonable juror could sentence Petitioner to death based solely upon evidence received at the guilt phase of his trial, relating to the commission of the crime. None of the alleged constitutional errors defaulted upon by Petitioner significantly detract from the crime's brutality. None of the alleged errors show clearly and convincingly that but for such error, no reasonable juror would have sentenced the petitioner to death based solely upon the vile nature of the crime alone.

Thus, in accordance with the discussion above, and the plain unambiguous statement by the Virginia Supreme Court that the claims listed were defaulted on state procedural grounds, for reasons previously given these claims are barred from review by this Court under *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), with the exception of claim (K) which is denied on its merits. The Court next turns its consideration to the remaining seven claims not defaulted on, namely (A), (C), (D), (G), (I), (L), and (N).

B. *Remaining Ineffective Assistance of Counsel Claims.*[44]

Before turning to a discussion of Petitioner's claims, the Court first wishes to stress that the Virginia Death Sentence Statute allows *two* alternate grounds upon which a sentence of death may be premised. *See* Va.Code Ann.

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[44] For the standard to be applied to ineffective assistance of counsel claims, see the discussion of *Strickland, supra* at 1414-18.

§ 19.2-264.2 (Michie 1990). The fact finder may impose death because *either*

> there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society [("future dangerousness")] *or* that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim [("vileness")].

Id. (emphasis added). It is important to note the disjunctive, meaning that *both* prongs need not be satisfied in order to impose death.

In Petitioner's case, the jury imposed the death penalty *only* on the vileness clause, having crossed out the portion of the verdict form addressing future dangerousness. *Record*, supra note 7, at 137. Because many of Petitioner's alleged ineffective assistance claims relate only to rebutting future dangerousness, and the jury did not sentence on this ground, such claims are of no help to Petitioner because he clearly was not prejudiced by any failure on the part of his attorney to rebut evidence of future dangerousness.

1. Informing Jurors of Prior Death Sentence.

Turning now to the specific claims, Petitioner first maintains that his counsel improperly permitted prospective jurors in *Turner II* to know about the death sentence he had received in *Turner I*. As Petitioner admits, his counsel became aware early on that he would need to think of a way to deal with the prior death sentence. *Petition* at ¶ 38. Counsel was concerned jurors would learn of the prior sentence from the fact that Petitioner was involved in two death row escape attempts in 1984 and 1985, because counsel knew that the prosecution intended to use these facts in rebuttal. *Id.; see also supra* note 6 and accompanying text.

Additionally, there was a concern that even without references to death row, jurors would deduce that Turner previously had been sentenced to death, based solely upon the case's status. Jurors would know Petitioner had already been convicted in 1979, and that the issue of guilt was not before them. They would know their job was to choose between a life and death sentence. From these facts alone, they could easily reach the conclusion that Petitioner previously had been sentenced to death, because no one sentenced to life would return to the jury to give them another chance to find for death. Thus, counsel elected to inform the jury of the prior sentence. Although other lawyers may disagree, it can be argued this was a sound strategy in that it made defense counsel appear totally forthcoming to the jury, at the limited expense of informing them of something they would very likely figure out on their own. It also gave counsel an opportunity to gauge jurors for any prejudice resulting from this knowledge during voir dire, so that any problematic jurors could be stricken. This is exactly the type of strategic choice *Strickland* requires to be made by the trial attorney, and not by a federal court and other critics years later. Therefore, this Court holds counsel was not ineffective in this regard as a matter of law, as the decision was entirely reasonable.

2. Failure to Put on Evidence Relating to Behavior During Escape Attempt.

Petitioner is next heard to complain that his counsel was constitutionally deficient for deciding not to introduce for mitigation purposes evidence of Petitioner's actions during an escape attempt involving six death row inmates in 1984 at Mecklenburg Correctional Center. It is Petitioner's contention the evidence would have revealed he was generally helpful in maintaining calm during the incident, *Petition* at ¶¶ 56-62, and that he even persuaded an inmate not to rape a nurse who was being held hostage. *Id.* at ¶ 61. As Petitioner concedes, his attorney chose

not to introduce mitigation evidence based on a concern that the prosecution's rebuttal evidence ultimately could have resulted in making the issue more damaging than helpful. *Id.* at ¶¶ 46, 54; *see also supra* note 6 and accompanying text.

Again, this is a strategic decision by counsel that *Strickland* says is owed deference by this Court. Furthermore, even if counsel was deficient in weighing the relative merits of evidence available to both sides, there was no prejudice to Petitioner in failing to introduce this mitigating evidence, because it was relevant only to the issue of future dangerousness. Therefore, because counsel's decision at trial arguably was correct as a matter of trial strategy, and Petitioner was not prejudiced by the decision, Petitioner has failed to establish a claim under *Strickland* based on his counsel's failure to present evidence regarding the Mecklenburg escape attempts.

3. Failure to Perform Adequate Pretrial Investigation.

Petitioner next faults his counsel for failing to perform adequate pretrial investigation of mitigation evidence. This Court first observes that the historical facts as found by the state court are presumed correct under 28 U.S.C. § 2254 (1988). In the transcript from the state habeas petition hearing held before Southampton County Circuit Court Judge Godwin from September 11-13, 1989, Petitioner's counsel Snook observed that he spent approximately 1,000 hours on Petitioner's case during the eight years he represented Turner, and a "couple of hundred hours" in preparation for resentencing. *Transcript II*, supra note 5, at 166-67. He spoke with Turner on the phone approximately fifty times, and in person eight to ten times. *Id.* at 167. He had lectured to various groups on dealing with death penalty cases, and considered himself knowledgeable on the subjects of the investigation and presentation of mitigating evidence. *Id.* at 165.

Furthermore, in preparation for resentencing, Snook reviewed all of Petitioner's state correctional records (*id.* at 171, 201); he had his secretary/paralegal review records and prepare a chronology of mitigating events from Petitioner's life (*id.* at 75); interviewed by phone potential mitigation witnesses, including Petitioner's friends and family members (*id.* at 105-09); he personally interviewed Petitioner's sister, Esmon Thompson, on three to four occasions (*id.* at 188-200); and he had substantive conversations concerning the petitioner with Petitioner's uncle, James Peeples (*id.* at 201). Based on the record in this case, it is clear that Petitioner's counsel conscientiously pursued numerous sources of mitigating evidence. Therefore Petitioner's claim more precisely asserts that his counsel did not do enough, or the right kind, of investigation of mitigating evidence.

The Fourth Circuit recently commented on a habeas petitioner's claim that his counsel might have done a better job in investigating. In *Williams v. Dixon,* 961 F.2d 448, 451 (4th Cir.), *cert. denied,* —— U.S. ——, 113 S.Ct. 510, 121 L.Ed.2d 445 (1992), the court observed:

> After careful review of the record, we agree that Williams' attorney could have perhaps investigated the facts of the case more thoroughly and with more diligence. However, we cannot conclude that his conduct was unreasonable without engaging in excessive second-guessing, which we refuse to do. Moreover, in light of the evidence, we believe that the government has carried its burden of showing beyond a reasonable doubt that the verdict would not have been different even if Williams' counsel had been more diligent or had used different trial tactics.

The same reasoning applies in this instance. Although it may be, as Petitioner alleges, that his counsel might have done things differently, the record establishes that counsel did engage in an investigation that at the very least complies with the reasonableness standard prescribed

by *Strickland*. To decide otherwise would require this Court to engage in extensive second-guessing, which it cannot do. Similarly, even if more investigation should have been performed, Petitioner was not prejudiced by any alleged failure, because as was discussed above, the jury based its finding solely on the vileness prong. Most of the things Petitioner suggests should have been done relate to mitigation of future dangerousness, and are thus irrelevant. Therefore, this Court holds that based upon the investigation performed by his counsel, Petitioner has failed to state a claim under *Strickland*.

4. Failure to Develop and Use Psychiatric Evidence.

Petitioner further points to his counsel's alleged failure to develop and use psychiatric evidence as proof of constitutional deficiency. Petitioner presents the opinions of Drs. Miller and Cornell, who claim that various neurological examinations should have been performed on the petitioner, and that if they had, they may have revealed various mental disorders. *Petition* at ¶¶ 109-11. The petitioner also claims that Dr. Brad Fisher, the court-appointed professor of psychology who served as Petitioner's mental health expert in *Turner II*, was "wholly inadequate." *Id.* at ¶¶ 112-20. He alleges Dr. Fisher was deficient by failing to submit an adequate report, and by failing to conduct a personal exam until January 9, 1987, two days after Petitioner's trial had started. *Id.* at 120.

Similar circumstances were presented in *Poyner v. Murray*, 964 F.2d 1404 (4th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992). There, the petitioner relied upon the affidavit of a psychiatrist in support of his contention that certain psychological tests should have been performed prior to the penalty phase of his trial. *Id.* at 1417. He alleged that his counsel's failure to develop psychiatric evidence showing that he was a serial killer amounted to ineffective assistance. *Id.* at 1418. In rejecting the claim, the court

noted that the petitioner had in fact been examined by various psychiatrists, and that

> [t]he gravamen of this claim is that these psychiatrists were not experienced or imaginative enough to recognize that Poyner might have been motivated by sexual sadism . . . or some other psychological disorder. . . . However, this court in the past has made clear that *there is no right to effective assistance of expert witnesses distinct from the right to effective assistance of counsel.* A clear overtone to the argument is the proposition that if a defense attorney has not produced a witness who would agree with the after-the-fact diagnosis presently presented, then the attorney is ineffective. We reject this proposition as we did its corollary in *Waye v. Murray,* 884 F.2d 765 (4th Cir.1989). . . . [T]he constitutionally deficient performance must be that of counsel, in obtaining the psychiatric examinations or presenting the evidence at trial for example, not that of the psychiatrist . . . in failing to identify every possible malady or argument, no matter how tenuous.

Id. at 1418-19 (emphasis added).

This discussion is particularly applicable to this case. Petitioner likewise relies upon affidavits of other psychiatrists who say that in their view, certain tests should have been performed. But as in *Poyner,* this does not avoid the fact that the petitioner and his extensive records were examined by a qualified mental health expert, who was obtained by his attorney for purposes of exploring potential psychological issues for mitigation purposes.

As to whether Dr. Fisher was deficient, the *Poyner* court is clear that his performance is not the issue—it is the attorney's performance. Under *Strickland,* it cannot be said that counsel here fell below an objective level of competence in selecting and relying upon Dr. Fisher. Dr. Fisher had been a professor of psychology at Duke University since 1982, and had done professional work

in the areas of psychological assessments of Alabama's prison population, as well as publishing over eighteen scholarly works in the field of psychology. *Record*, supra note 7, at 64-65 (Dr. Fisher's Curriculum Vitae submitted for the record in *Turner II*). Dr. Fisher personally examined Petitioner, his prison records, and records of prior evaluations that had been performed on him. *Transcript II*, supra note 5, at 89-100. Dr. Fisher was eminently qualified, and counsel's reliance upon him was reasonable. Petitioner's complaints with the quality of Dr. Fisher's examination are inapposite to the issue of effective assistance of *counsel*, as described in *Poyner*.

In a related manner, Petitioner claims counsel was deficient for failing to use the theory developed by Dr. Fisher, namely that Petitioner's violent nature had "burned out" so that he was no longer dangerous. *Petition* at ¶¶ 112, 120. As this again is mitigating evidence going to "future dangerousness," Petitioner was not prejudiced because the jury's finding was based solely on vileness. Furthermore, the decision to not present this evidence again falls into the category of sound trial strategy, and thus Petitioner again fails to show counsel was deficient in this manner. Therefore, Petitioner has failed to state a claim under *Strickland* based on counsel's development of psychological evidence, because counsel reasonably relied upon Dr. Fisher. Petitioner also fails to state a claim based upon counsel's failure to present evidence of Dr. Fisher's theory at trial, because not only was this a conscious strategic decision by counsel, but Petitioner was not prejudiced, as evidenced by the jury's failure to find "future dangerousness."

5. Failure to Present a Defense.

Petitioner next states his counsel was deficient for failing to put on mitigating evidence on Petitioner's behalf, even though this evidence initially had been promised to the jury by counsel in his opening statement. This claim

can be dealt with keeping in mind the *Strickland* standard already discussed.

After giving the matter serious consideration and discussing it at length with co-counsel Woodward, Snook made a conscious choice not to put on any mitigating evidence on Petitioner's behalf. *Transcript II*, supra note 5, at 141-62, 414-18. Messrs. Snook and Woodward were concerned about damaging evidence the government might put on in rebuttal, they felt the jury would not be convinced by their evidence, and they thought the prosecution had rested prematurely without putting on as strong a case as it might have, presumably in anticipation of the defense's case. *Id.* In short, they felt there was more to be lost than gained by putting on mitigating evidence.

This is paradigmatic of what the Supreme Court was referring to as trial strategy in *Strickland*. Although some trial lawyers could make a cogent argument as to the negative aspects of this choice, *Strickland* stresses that the choice remains with trial counsel and not with this Court or other Monday-morning quarterbacks. Because there were strategically acceptable reasons for Snook's choice, under *Strickland* the choice remains his to have made.

6. Failure to Object to Evidence Regarding a Prior Conviction.

Petitioner further alleges his counsel was deficient for failing to object to evidence concerning Petitioner's allegedly unconstitutional second-degree murder conviction, which then allowed this evidence to be presented to the jury. Here the Court would reference its earlier discussion of this claim, *see supra* at 1425-27, and hold that under *Strickland* counsel can hardly be faulted for failing to object to admission of Petitioner's 1974 conviction based upon a case that would not be decided for some six months. It was reasonable not to object, because such an objection would have been denied under Virginia law

as it stood. Therefore, this claim of ineffective assistance is denied as meritless.[45]

In summary, after reviewing the record and pleadings, and for the reasons stated, this Court finds that under the standard articulated by the Supreme Court in *Strickland*, the petitioner has failed to state a claim of ineffective assistance of counsel.

C. *Remaining Claims.*

1. Collateral Review Process Provided by Virginia.

The next claim advanced by the petitioner is that the collateral review of his death sentence afforded by the Virginia courts was so "shallow and shameful" as to be in violation of his rights under the Eighth and Fourteenth Amendments. Petitioner's claim is based upon his view that the Circuit Court's five-page letter order was too cursory; that the Circuit Court labored under a misconception of *Strickland*; that the Circuit Court improperly balanced mitigating evidence against the petitioner; that the Circuit Court should not have adopted the findings of fact proposed by the respondent; that other claims dismissed should also have received an evidentiary hearing; and finally, that the Virginia procedural rules described in *Slayton* and *Hawks* are too onerous to provide proper review in light of the fact that many of Petitioner's claims were defaulted.[46]

It is the majority rule, as well as the settled rule in the Fourth Circuit, that "error occurring in a state post-conviction proceeding cannot serve as a basis for federal *habeas corpus* relief." *Bryant v. State of Maryland*, 848

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[45] Petitioner's final asserted ground for ineffective assistance relates to any failure on counsel's part that resulted in default of any claims. This contention was effectively denied by the discussion *supra*, at 1414-28.

[46] As to this last contention, the Court refers to its discussion of procedural bars *supra* at 1412-15, and particularly to footnote 11.

F.2d 492, 493 (4th Cir.1988); *Kirby v. Dutton*, 794 F.2d 245, 247 (6th Cir.1986) ("the writ [of habeas corpus] is not the proper means by which prisoners should challenge errors or deficiencies in state post-conviction proceedings . . . because the claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration"). Thus, habeas corpus cannot be used in federal court to examine a prior habeas proceeding in state court, and Petitioner's claim on this ground is without merit.

2. Conflicts Involving Attorney Woodward.

Petitioner next claims that the prosecution used information in *Turner II* that had been received improperly from Woodward during the *Turner I* post-conviction proceedings, and that use of this information was in violation of attorney-client privilege, and therefore his rights under the Fifth, Sixth, and Fourteenth Amendments. In a related manner, Petitioner alleges that because Woodward cooperated with the prosecutor in connection with *Turner I* post-conviction proceedings, Woodward therefore had a conflict of interest and should not have been allowed to represent the petitioner as co-counsel with Snook in *Turner II*.

Regarding the claim that information from the *Turner I* state habeas proceeding was received in violation of the petitioner's attorney-client privilege, the Court notes Va.Code Ann. § 8.01-654(B)(6) (Michie 1990), which states:

> If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground.

The fact that following *Turner I* Woodward would turn his files over to the Commonwealth pursuant to this

statute, so that the Commonwealth could effectively dispute Petitioner's claim of ineffective assistance, comes as no surprise. The statute makes it clear that no privilege existed. Similarly, any constitutional rights Petitioner may have had in communications between he and his attorney also were waived once Petitioner placed his counsel's performance at issue by claiming ineffective assistance. *See Tasby v. United States,* 504 F.2d 332, 336 (8th Cir.1974) ("when a client calls into public question the competence of his attorney, the privilege is waived"), *cert. denied,* 419 U.S. 1125, 95 S.Ct. 811, 42 L.Ed.2d 826 (1975).

As to Woodward's claimed conflict of interest, the petitioner fails to state a claim here as well. On July 31, 1986, Petitioner appeared before Judge Godwin for purposes of having counsel appointed. *Commonwealth v. Turner,* No. 870554, Tr. of Motion (Southampton County Cir. Ct. July 31, 1986). After consultation between counsel, Petitioner, and the Judge, Turner approved the appointments of Messrs. Woodward and Snook. Judge Godwin specifically had asked Turner whether he wished to have Woodward serve as co-counsel, even though Turner had previously challenged Woodward's competency.

Waivers of constitutional rights, including the right to conflict free counsel, must be " 'knowingly, voluntarily, and intelligently' made and they must not be lightly inferred." *Reckmeyer v. United States,* 709 F.Supp. 680, 691 (E.D.Va.1989) (quoting *Bridges v. United States,* 794 F.2d 1189, 1193 (7th Cir.1986)), *aff'd,* 900 F.2d 257 (4th Cir.1990). In light of the fact that Petitioner was counseled by Judge Godwin as to whether he truly wished to have Woodward appointed as his counsel, and Petitioner consented, any conflict of interest that may or may not have existed was waived.

Petitioner claims his waiver was not knowing because he was unaware Woodward had turned over documents

in alleged violation of the attorney-client privilege. But as stated above, Woodward did not commit any breach in releasing those documents. Therefore, Petitioner did in fact knowingly waive any perceived conflict relating to Woodward's previous representation of him, a fact of which he was well aware.

Furthermore, even assuming there was no waiver and an actual conflict of interest did exist as to Woodward, Petitioner was not prejudiced as a result. Under *Strickland,* 466 U.S. at 692, 104 S.Ct. at 2067 (quoting *Cuyler v. Sullivan,* 446 U.S. 335, 350, 348, 100 S.Ct. 1708, 1719, 1718, 64 L.Ed.2d 333 (1980)), prejudice to the defendant arising from an attorney's conflict of interest "is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' "

At the *Turner II* proceedings, Snook at all times served as lead counsel, and it is undisputed he was conflict free. The Fourth Circuit anticipated *exactly* this scenario in *Hoffman v. Leeke,* 903 F.2d 280, 287 (4th Cir.1990), where the court observed that "[t]he *Strickland* Court intimates that there may be some peripheral category of extremely unusual cases in which an actual conflict of interest adversely affecting counsel's performance may not result in presumed prejudice." As a prescient example of such a case, the Fourth Circuit described

> a situation where a defendant, represented by co-counsel, received effective assistance from his conflict-free counsel at all critical stages of the criminal process, while his conflicted attorney plays a subsidiary role. We suspect that some such instances may fall within the class of cases discussed by the Supreme Court in *Strickland,* where, notwithstanding an actual conflict of interest adversely affecting the attorney's performance, prejudice will not be presumed.

Id. at 287 n. 3. First, as was discussed at length above, the petitioner at all time received effective assistance of counsel during the *Turner II* proceedings. Second, even if some aspect of Woodward's representation in his subsidiary role was problematic due to some conflict, Snook's clearly was not. Alternatively, this Court finds that if Woodward was indeed in actual conflict, and the conflict had not been waived, that nevertheless the petitioner was not prejudiced by having Woodward serve as co-counsel, based upon the fact that Snook was clearly in charge and was at all times constitutionally effective and conflict free.

3. Retention of Juror Samuel Lambert.

Petitioner next claims that Juror Samuel Lambert should have been struck for cause because his voir dire revealed he could not refrain from allowing the previous institution of the death penalty from affecting his consideration.[47] The trial court questioned him on this matter, and Juror Lambert responded affirmatively that he would decide the petitioner's sentence solely on the basis of the evidence presented in court, and that he would not consider the previous sentence. *See Transcript I*, supra note 2, at 52-64.

In *Adams v. Aiken*, 965 F.2d 1306, 1317 (4th Cir. 1992) (quoting *Patton v. Yount*, 467 U.S. 1025, 1036, 1038, 104 S.Ct. 2885, 2891, 2892, 81 L.Ed.2d 847 (1984) (citations omitted)), the court held that under § 2254(d),

> factual findings by the state court are presumed to be correct. This presumption applies to a trial court's determination that an individual juror is impartial. The issue for the trial court is whether the juror swore "that he could set aside any opinion

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[47] For the standard to be applied to the exclusion of jurors, *see supra* at 1424-25.

> . . . and decide the case on the evidence, and should the juror's protestation of impartiality [be] believed."

This discussion applies equally to whether Juror Lambert should have been excused. The trial judge questioned him as to whether he would ignore the previously imposed death sentence, and Mr. Lambert said he would. Judge Godwin, not this Court, had the ability to observe Mr. Lambert, and Judge Godwin did so and decided he was fit to serve. The trial court's finding on Mr. Lambert's ability to do so is, under *Adams v. Aiken* and § 2254(d), a finding of fact presumed correct, and there is nothing in the record that would overcome that presumption. Petitioner's claim on this ground is therefore denied.

4. Jury Instructions.

Petitioner next alleges that the jury instructions were biased toward imposition of death. Petitioner raises a number of issues with respect to offered or refused instructions, which this Court will address *ad seriatim*. In reviewing the propriety of jury instructions, this Court keeps in mind that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). Furthermore, the "burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736-37, 52 L.Ed.2d 203 (1977).

Thus, the standard is " 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process' and not merely whether the instruction is 'undesirable, erroneous, or even 'universally condemned.' ' " *Briley v. Bass*, 750 F.2d 1238, 1243 (4th Cir.1984) (quoting *Cupp*, 414 U.S. at 146,

94 S.Ct. at 400), *cert. denied*, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985).

The petitioner maintains that the instruction offered failed to inform "the jury that it had the option to recommend against death even if it found the presence of aggravating circumstances and no mitigating circumstances." *Petition* at ¶ 297. The instruction offered stated in pertinent part the following:

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt either alternative, then you shall fix the punishment of the defendant at life imprisonment.

Petition at Exh. 2, No. 1. Petitioner asserts that the words "you may," coupled with an absence of *enough* comment on the function of mitigating circumstances could have given a juror the impression that in the absence of mitigating circumstances he should find for death. *Petition* at ¶ 297. This same contention was made concerning the same instruction in *Jones v. Murray*, 947 F.2d 1106, 1119 (4th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 2295, 119 L.Ed.2d 219 (1992). There the court upheld the instruction, expressly rejecting the argument that it "failed to inform the jury of its option to recommend life imprisonment and its obligation to consider mitigating evidence." *Id.*

It is further noted that Instruction Seven given by the trial court clearly reminds the jury of its duty to consider mitigating evidence. That instruction reads

> The Court instructs the jury that in determining whether to sentence Willie Turner to life imprisonment in the penitentiary or to death, you shall consider the circumstances surrounding the offense, the history and background of Willie Turner, and any other facts of the offense. You should consider those characteristics of the defendant which may be considered as extenuating or reducing the degree of moral culpability or blame and which therefore may call for the imposition of a punishment less than death.

Petition Exh. 2, No. 7. Thus, in view of *Jones v. Murray* and examining the instructions as a whole, there is no question but that the jury was aware of its option to impose a life sentence, and its obligation to consider mitigating evidence. This Court therefore finds that the instructions as a whole were not biased toward the death penalty's imposition.

Petitioner also asserts the instructions were deficient for failing to inform the jury it could consider mercy or compassion when making its determination. Petitioner fails to cite any case which would require such an instruction, and this Court can find none. The instructions given adequately informed the jury of its duty to consider mitigating evidence. The Constitution does not require the state to establish specific standards for the weighing of mitigating evidence, *Clozza v. Murray*, 913 F.2d 1092, 1103 (4th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1123, 113 L.Ed.2d 231 (1991), and thus this Court will not now require that a "mercy or compassion" standard should be mandated.

Petitioner next argues that the instructions failed to "sufficiently guide the jury in its determination that the punishment of death could be imposed upon a finding that Turner's crime was 'outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim.'" *Petition* at ¶ 299.

The petitioner proffered, and was denied, an instruction stating: "All willful, deliberate and premeditated murders are vile, horrible and inhuman, but not all such murders are 'outrageously or wantonly vile, horrible and inhuman.' " *Record,* supra note 7, at 118. The instruction actually offered by the court followed the statute's wording, and included the statement that the jury must find beyond a reasonable doubt that "his conduct in committing the offense was *outrageously* or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim." *Petition* Exh. 1, No. 1. As noted above, the Fourth Circuit previously has reviewed this instruction and upheld it without the embellishment now urged by the petitioner, and it is clear from the instruction itself that the jury could not fail to understand that the conduct must be found to have been "outrageous or wanton." Therefore, the instruction given was sufficient.

Finally, the petitioner claims the court should have instructed the jury that "Turner was entitled to a presumption of deserving life imprisonment." *Petition* at ¶ 301. The instruction actually given read as follows:

> The Court instructs the jury that in this proceeding the burden is upon the Commonwealth to prove each and every fact required for imposition of the death penalty, as set forth in other instructions of this Court, by evidence so strong, so clear, and so conclusive that there is left in the minds of the jury no reasonable doubt. Where the evidence is susceptible to two interpretations, one consistent with the imposition of the death penalty, and the other with the imposition of life imprisonment, you should not adopt that interpretation which is consistent with imposition of the death penalty.
>
> If, therefore, upon a consideration of all the evidence, there exists in your minds a reasonable doubt as to any fact or conclusion you are required to find

> before the death penalty may be imposed, you shall impose a sentence of life imprisonment.

Petition Exh. 2, No. 2. This says essentially the same thing—that the Commonwealth bore the burden of proving beyond a reasonable doubt that the death penalty was proper. The instruction given made the jury aware of the fact that if at any time the Commonwealth failed to prove beyond a reasonable doubt that the death penalty should be imposed, that they the jury "*shall* impose a sentence of life imprisonment." This is the same thing as saying a life sentence is presumed. Because Petitioner's offered instruction was simply redundant, there was no harm in failing to offer his instruction.

Therefore, for the above stated reasons as to all the jury instructions offered, and as to those refused, this Court holds that the instructions examined as a whole were constitutionally sound.

5. Instruction Regarding Parole.

Petitioner next claims that the trial court improperly excluded evidence or instructions concerning Petitioner's unlikely chance of parole if given a life sentence, which he asserts interfered with his right to present mitigating evidence. The trial judge's refusal was in keeping with Virginia law, which has long held that the jury should not receive an instruction concerning parole eligibility if punishment is fixed at life imprisonment. *See Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254, 258 (1991), *cert. denied*, ——— U.S. ———, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808, 820-21 (Va.1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980); *Hinton v. Commonwealth*, 219 Va. 492, 247 S.E.2d 704 (1978).

This same claim has been raised and rejected previously by the Fourth Circuit. *See Peterson v. Murray*,

904 F.2d 882, 886 (4th Cir.) ("we believe that [*California v. Ramos,* 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)] left to the states the decision concerning what, if anything, a jury should be told about commutation, pardon, and parole"), *cert. denied,* 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990). In fact, *this* petitioner advanced this *same* claim during his first round of federal habeas appeals, and the Fourth Circuit gave him the *same* answer: "while it is constitutionally permissible to instruct the jury on the subject of parole, such an instruction is not constitutionally required." *Turner v. Bass,* 753 F.2d 342, 354 (4th Cir. 1985), *rev'd on other grounds sub nom. Turner v. Murray,* 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). As the Fourth Circuit said in *Peterson,* 904 F.2d at 887, "[o]ur holding in *Turner* controls here." Nothing has changed in the interim, and Petitioner's claim is again denied.

6. Ex Post Facto Claim.

Finally, Petitioner alleges that the application of Va. Code Ann. § 19.2-264.3(C) (Michie 1990) was in violation of the United States Constitution's *ex post facto* clause. The Court notes the Fourth Circuit previously has considered this issue in the case of *Evans v. Thompson,* 881 F.2d 117, 119-21 (4th Cir.1989), *cert. denied,* 497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990), and rejected the argument, which is binding upon this Court.

V. CONCLUSION

The Court carefully has considered each of Petitioner's claims, considered arguments of counsel, and conducted a detailed, independent examination of the state record. For the reasons discussed, the petition for habeas corpus is DENIED, and respondent's motion is GRANTED, with judgment entered in favor of respondent.

APPENDIX C

Filed October 17, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-4001
CA-91-1846-AM

WILLIE LLOYD TURNER,
Petitioner-Appellant

v.

DAVID A. WILLIAMS, Warden,
Powhatan Correctional Center,
Respondent-Appellee

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

The parties' petitions for rehearing and suggestions for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestions for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX D

COMMONWEALTH OF VIRGINIA
DEATH PENALTY CASES

Cases	Aggravating Factors Found: Vileness	Aggravating Factors Found: Future Dangerousness
Barnes v. Commonwealth, 234 Va. 130, 360 S.E.2d 196 (1987), *cert. denied*, 484 U.S. 1036 (1988)	x	x
Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), *cert. denied*, 456 U.S. 938 (1982)		x
Beaver v. Commonwealth, 232 Va. 521, 352 S.E.2d 342, *cert. denied*, 483 U.S. 1033 (1987)		x
Beavers v. Commonwealth, 245 Va. 268, 427 S.E.2d 411, *cert. denied*, 114 S. Ct. 171 (1993)		x
Bennett v. Commonwealth, 236 Va. 448, 374 S.E.2d 303 (1988), *cert. denied*, 490 U.S. 1028 (1989)	x	
Boggs v. Commonwealth, 229 Va. 501, 331 S.E.2d 407 (1985), *cert. denied*, 475 U.S. 1031 (1986)	x	
Breard v. Commonwealth, 248 Va. 68, 445 S.E.2d 670, *cert. denied*, 115 S. Ct. 442 (1994)	x	x
Briley v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980), *cert. denied*, 451 U.S. 1031 (1981)	x	x
Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980)	x	x
Buchanan v. Commonwealth, 238 Va. 389, 384 S.E.2d 757 (1989), *cert. denied*, 493 U.S. 1063 (1990)	x	

Cases	Aggravating Factors Found: Vileness	Aggravating Factors Found: Future Dangerousness
Bunch v. Commonwealth, 225 Va. 423, 304 S.E.2d 271, *cert. denied*, 464 U.S. 977 (1983)	x	
Burket v. Commonwealth, 450 S.E.2d 124 (Va. 1994)	x	x
Cardwell v. Commonwealth, 450 S.E.2d 146 (Va. 1994)	x	
Chabrol v. Commonwealth, 245 Va. 327, 427 S.E.2d 374 (1993)	x	
Cheng v. Commonwealth, 240 Va. 26, 393 S.E.2d 599 (1990)	x	
Chichester v. Commonwealth, 248 Va. 311, 448 S.E.2d 638 (1994)		x
Clanton v. Commonwealth, 223 Va. 41, 286 S.E.2d 172 (1982)	x	x
Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980)	x	
Clozza v. Commonwealth, 228 Va. 124, 321 S.E.2d 273 (1984), *cert. denied*, 469 U.S. 1230 (1985)	x	x
Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983), *cert. denied*, 465 U.S. 1109 (1984)	x	x
Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103 (1980)	x	
Correll v. Commonwealth, 232 Va. 454, 352 S.E.2d 352, *cert. denied*, 482 U.S. 931 (1987)	x	

Cases	Aggravating Factors Found: Vileness	Aggravating Factors Found: Future Dangerousness
Davidson v. Commonwealth, 244 Va. 129, 419 S.E.2d 656, *cert. denied*, 113 S. Ct. 423 (1992)	x	
Delong v. Commonwealth, 234 Va. 357, 362 S.E.2d 669 (1987), *cert. denied*, 485 U.S. 929 (1988)		x
Dubois v. Commonwealth, 246 Va. 260, 435 S.E.2d 636 (1993), *cert. denied*, 114 S. Ct. 1389 (1994)		x
Eaton v. Commonwealth, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 112 S. Ct. 88 (1991)		x
Edmonds v. Commonwealth, 229 Va. 303, 329 S.E.2d 807, *cert. denied*, 474 U.S. 975 (1985)	x	x
Evans v. Commonwealth, 228 Va. 468, 323 S.E.2d 114 (1984), *cert. denied*, 471 U.S. 1025 (1985)		x
Evans v. Commonwealth, 222 Va. 766, 284 S.E.2d 816 (1981), *cert. denied*, 455 U.S. 1038 (1982)		x
Fisher v. Commonwealth, 236 Va. 403, 374 S.E.2d 46 (1988), *cert. denied*, 490 U.S. 1028 (1989)		x
Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798 (1982), *cert. denied*, 459 U.S. 1228 (1983)	x	
Frye v. Commonwealth, 231 Va. 370, 345 S.E.2d 267 (1986)		x
George v. Commonwealth, 242 Va. 264, 411 S.E.2d 12 (1991), *cert. denied*, 112 S. Ct. 1591 (1992)	x	x

Cases	Aggravating Factors Found: Vileness	Aggravating Factors Found: Future Dangerousness
Giarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980)		x
Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157, *cert. denied*, 484 U.S. 873 (1987)	x	x
Hoke v. Commonwealth, 237 Va. 303, 377 S.E.2d 595, *cert. denied*, 491 U.S. 910 (1989)	x	x
Jenkins v. Commonwealth, 244 Va. 445, 423 S.E.2d 360 (1992), *cert. denied*, 113 S. Ct. 1862 (1993)	x	x
Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979)		x
Johnson v. Commonwealth, 221 Va. 736, 273 S.E.2d 784, *cert. denied*, 454 U.S. 920 (1981)		x
Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984), *cert. denied*, 472 U.S. 1012 (1985)	x	
Justus v. Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980)	x	
Justus v. Commonwealth, 222 Va. 667, 283 S.E.2d 905 (1981), *cert. denied*, 455 U.S. 983 (1982)	x	
King v. Commonwealth, 243 Va. 353, 416 S.E.2d 669, *cert. denied*, 113 S. Ct. 417 (1992)	x	x
LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983), *cert. denied*, 464 U.S. 1063 (1984)	x	
Mackall v. Commonwealth, 236 Va. 240, 372 S.E.2d 759 (1988), *cert. denied*, 492 U.S. 925 (1989)		x

	Aggravating Factors Found	
Cases	Vileness	Future Dangerousness
Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980)		x
Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, *cert. denied*, 444 U.S. 919 (1979)	x	x
Mickens v. Commonwealth, 247 Va. 395, 442 S.E.2d 678, *cert. denied*, 115 S. Ct. 307 (1994)	x	x
Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992), *cert. denied*, 113 S. Ct. 1880 (1993)	x	x
Mu'Min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990), *aff'd*, 500 U.S. 415 (1991)	x	x
Murphy v. Commonwealth, 246 Va. 136, 431 S.E.2d 48, *cert. denied*, 114 S. Ct. 336 (1993)	x	x
O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491, *cert. denied*, 488 U.S. 871 (1988)		x
Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981)	x	x
Payne v. Commonwealth, 233 Va. 460, 357 S.E.2d 500, *cert. denied*, 484 U.S. 933 (1987)	x	
Peterson v. Commonwealth, 225 Va. 289, 302 S.E.2d 520, *cert. denied*, 464 U.S. 865 (1983)		x
Pope v. Commonwealth, 234 Va. 114, 360 S.E.2d 352 (1987), *cert. denied*, 485 U.S. 1015 (1988)		x

Cases	Aggravating Factors Found: Vileness	Aggravating Factors Found: Future Dangerousness
Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815, *cert. denied*, 474 U.S. 865 *and* 474 U.S. 888 (1985)	x	x
Pruett v. Commonwealth, 232 Va. 266, 351 S.E.2d 1 (1986), *cert. denied*, 482 U.S. 931 (1987)	x	x
Quesinberry v. Commonwealth, 241 Va. 364, 402 S.E.2d 218, *cert. denied*, 112 S. Ct. 113 (1991)	x	x
Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982), *cert. denied*, 460 U.S. 1029 (1983)	x	x
Ramdass v. Commonwealth, 246 Va. 413, 437 S.E.2d 566 (1993), *vacated*, 114 S. Ct. 2701 (1994)		x
Ramdass v. Commonwealth, 450 S.E.2d 360 (Va. 1994)		x
Rogers v. Commonwealth, 242 Va. 307, 410 S.E.2d 621 (1991)	x	x
Satcher v. Commonwealth, 244 Va. 220, 421 S.E.2d 821 (1992), *cert. denied*, 113 S. Ct. 1319 (1993)	x	x
Saunders v. Commonwealth, 242 Va. 107, 406 S.E.2d 39, *cert. denied*, 112 S. Ct. 386 (1991)		x
Savino v. Commonwealth, 239 Va. 534, 391 S.E.2d 276, *cert. denied*, 498 U.S. 882 (1990)		x
Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979)	x	x

Cases	Aggravating Factors Found: Vileness	Aggravating Factors Found: Future Dangerousness
Smith v. Commonwealth, 239 Va. 243, 389 S.E.2d 871, *cert. denied*, 498 U.S. 881 (1990)	x	x
Spencer v. Commonwealth, 238 Va. 295, 384 S.E.2d 785 (1989), *cert. denied*, 493 U.S. 1093 (1990)	x	x
Spencer v. Commonwealth, 240 Va. 78, 393 S.E.2d 609, *cert. denied*, 498 U.S. 908 (1990)	x	x
Spencer v. Commonwealth, 238 Va. 275, 384 S.E.2d 775 (1989), *cert. denied*, 493 U.S. 1036 (1990)	x	x
Spencer v. Commonwealth, 238 Va. 563, 385 S.E.2d 850 (1989), *cert. denied*, 493 U.S. 1093 (1990)	x	x
Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972 (1980)	x	x
Stewart v. Commonwealth, 245 Va. 222, 427 S.E.2d 394, *cert. denied*, 114 S. Ct. 143 (1993)	x	x
Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371, *cert. denied*, 469 U.S. 873 (1984)	x	x
Stockton v. Commonwealth, 241 Va. 192, 402 S.E.2d 196, *cert. denied*, 112 S. Ct. 280 (1991)	x	x
Stout v. Commonwealth, 237 Va. 126, 376 S.E.2d 288, *cert. denied*, 492 U.S. 925 (1989)	x	x
Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227, *cert. denied*, 112 S. Ct. 386 (1991)	x	x

Cases	Aggravating Factors Found: Vileness	Aggravating Factors Found: Future Dangerousness
Swann v. Commonwealth, 247 Va. 222, 441 S.E.2d 195, *cert. denied*, 115 S. Ct. 234 (1994)		x
Thomas v. Commonwealth, 244 Va. 1, 419 S.E.2d 606, *cert. denied*, 113 S. Ct. 421 (1992)	x	
Townes v. Commonwealth, 234 Va. 307, 362 S.E.2d 650 (1987), *cert. denied*, 485 U.S. 971 (1988)		x
Tuggle v. Commonwealth, 228 Va. 493, 323 S.E.2d 539 (1984), *rev'd*, 471 U.S. 1096 (1985)	x	x
Tuggle v. Commonwealth, 230 Va. 99, 334 S.E.2d 838 (1985), *cert. denied*, 478 U.S. 1010 (1986)	x	x
Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981)	x	x
Turner v. Commonwealth, 234 Va. 543, 364 S.E.2d 483, *cert. denied*, 486 U.S. 1017 (1988)	x	
Turner v. Williams, No. 901335 (Va. Apr. 30, 1991)	x	
Virginia Dept. of Corrections v. Clark, 227 Va. 525, 318 S.E.2d 399 (1984)	x	
Washington v. Commonwealth, 228 Va. 535, 323 S.E.2d 577 (1984), *cert. denied*, 471 U.S. 1111 (1985)	x	
Watkins v. Commonwealth, 238 Va. 341, 385 S.E.2d 50 (1989), *cert. denied*, 494 U.S. 1074 (1990)	x	x

Cases	Aggravating Factors Found: Vileness	Aggravating Factors Found: Future Dangerousness
Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985), *cert. denied*, 475 U.S. 1099 (1986)	x	x
Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202, *cert. denied*, 442 U.S. 924 (1979)	x	
Weeks v. Commonwealth, 450 S.E.2d 379 (Va. 1994)	x	
Whitley v. Commonwealth, 223 Va. 66, 286 S.E.2d 162, *cert. denied*, 459 U.S. 882 (1982)	x	
Williams v. Commonwealth, 450 S.E.2d 365 (Va. 1994)	x	x
Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361 (1987), *cert. denied*, 484 U.S. 1020 (1988)		x
Wise v. Commonwealth, 230 Va. 322, 337 S.E.2d 715 (1985), *cert. denied*, 475 U.S. 1112 (1986)	x	
Wright v. Commonwealth, 245 Va. 177, 427 S.E.2d 379 (1993), *vacated*, 114 S. Ct. 2701 (1994)		x
Yeatts v. Commonwealth, 242 Va. 121, 410 S.E.2d 254 (1991), *cert. denied*, 112 S. Ct. 1500 (1992)		x

APPENDIX E

Relevant Constitutional and Statutory Provisions

U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. Const. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. amend. XIV § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1254(1) (1988): "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

28 U.S.C. § 2254 (1988): "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Del. Code Ann. tit. 11, § 4209(e)(I)(l) (1993): "(e) *Aggravating circumstances.*—(I) In order for a sentence of death to be imposed, the jury, unanimously, or a judge when applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder: . . . (l) The murder was outrageously or wantonly

vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive or poison or the defendant used such means on the victim prior to murdering him."

Ga. Code Ann. § 17-10-30(b)(7) (Michie 1994): "(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: . . . (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

Mo. Rev. Stat. § 565.032(2)(7) (Vernon 1994 Supp.): "(2) Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following: . . . (7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

Nev. Rev. Stat. § 200.033(8) (1992): "The only circumstances by which murder of the first degree may be aggravated are: . . . (8) The murder involved torture, depravity of mind or the mutilation of the victim."

N.J. Rev. Stat. § 2C:11-3(c)(4)(c) (1994 Supp.): "(4) The aggravating factors which may be found by the jury or the court are: . . . (c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim."

S.D. Codified Laws Ann. § 23A-27A-1(6) (1994 Supp.): "Pursuant to §§ 23A-27A-2 to 23A-27A-6, inclusive, in all cases for which the death penalty may be authorized, the judge shall consider, or shall include in instructions

to the jury for it to consider, any mitigating circumstances and any of the following aggravating circumstances which may be supported by the evidence: . . . (6) The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

Va. Code Ann. § 18.2-31 (Michie 1994 Supp.): "§ 18.2-31. Capital murder defined; punishment.—The following offenses shall constitute capital murder, punishable as a class 1 felony:

1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

2. The willful, deliberate, and premeditated killing of any person by another for hire;

3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery while armed with a deadly weapon;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape or forcible sodomy or attempted forcible sodomy;

6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9-169(9) when such killing is for the purpose of interfering with the performance of his official duties;

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

8. The willful, deliberate, and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction; and

9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation."

Va. Code Ann. § 19.2-264.4(C) (Michie 1994 Supp.): "The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim."

FILED
FEB 21 1995

(3)

No. 94-1238

In The

Supreme Court of the United States

October Term, 1994

WILLIE LLOYD TURNER,

Petitioner,

v.

JOHN JABE, WARDEN,
GREENSVILLE CORRECTIONAL CENTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONER'S ARGUMENT AGAINST THE CONSTITUTIONALITY OF VIRGINIA'S STATUTORY VILENESS PREDICATE IS NOT COGNIZABLE UNDER THE "NEW RULE" DOCTRINE IN *TEAGUE V. LANE*, 489 U.S. 288 (1989), AND ITS PROGENY?

II. WHETHER PETITIONER'S CHALLENGE TO THE VILENESS CIRCUMSTANCE OTHERWISE IS NOT REVIEWABLE BECAUSE IT ONLY RAISES A STATE LAW CLAIM AND BECAUSE PETITIONER HAS PROCEDURALLY DEFAULTED ON IT?

III. WHETHER PETITIONER'S VILENESS ARGUMENT FAILS TO RAISE A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION?

IV. WHETHER PETITIONER'S CLAIM THAT TRIAL COUNSEL WERE INEFFECTIVE IS TOO FACT-SPECIFIC AND TOO INSUBSTANTIAL TO WARRANT THIS COURT'S DISCRETIONARY REVIEW?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

OPINION BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

REASONS FOR DENYING THE WRIT 7

I. PETITIONER'S ARGUMENT ATTACKING THE CONSTITUTIONALITY OF VIRGINIA'S STATUTORY VILENESS FACTOR IS A NON-REVIEWABLE "NEW RULE" UNDER *TEAGUE V. LANE*, 489 U.S. 288 (1989), AND ITS PROGENY 7

II. PETITIONER'S VILENESS ARGUMENT RAISES NO FEDERAL CONSTITUTIONAL ISSUE AND OTHERWISE IS NOT REVIEWABLE IN LIGHT OF HIS PROCEDURAL DEFAULT 10

III. VIRGINIA'S STATUTORY VILENESS PREDICATE, BOTH FACIALLY AND AS APPLIED TO THE FACTS OF THIS CASE, IS CLEARLY CONSTITUTIONAL 15

IV. PETITIONER'S INEFFECTIVE COUNSEL CLAIM IS TOO FACT-SPECIFIC AND TOO INSUBSTANTIAL TO WARRANT REVIEW BY THIS COURT 21

CONCLUSION 24

APPENDIX ..... App. 1

TABLE OF CITATIONS

Page

CASES

Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988).....21, 22

Arave v. Creech, 113 S.Ct. 1534 (1993)..... 17, 18, 19, 20

Boggs v. Bair, 892 F.2d 1193 (4th Cir. 1989), *cert. denied*, 497 U.S. 1043 (1990)..... 9

Breard v. Virginia, 115 S.Ct. 1442 (1994)..... 10

Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985)..... 9

Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991), *cert. denied*, 113 S.Ct. 20 (1992)..... 9

Butler v. McKellar, 494 U.S. 407 (1990)..... 8

California v. Ramos, 463 U.S. 992 (1983).....11, 12

Cardinale v. Louisiana, 394 U.S. 437 (1969) 13

Caspari v. Bohlen, 114 S.Ct. 948 (1994) 8

Clozza v. Murray, 913 F.2d 1092 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1123 (1991) 9

Coleman v. Thompson, 111 S.Ct. 2546 (1991) 15

Coleman v. Thompson, 895 F.2d 139 (4th Cir. 1990) 19

Frisby v. Shultz, 487 U.S. 474 (1988) 18

George v. Virginia, 112 S.Ct. 1591 (1992)..... 10

Gilmore v. Taylor, 113 S.Ct. 2112 (1993) 8, 9

Godfrey v. Georgia, 446 U.S. 420 (1980).....10, 16, 17

Graham v. Collins, 113 S.Ct. 892 (1993)..... 8

Gray v. Commonwealth, 233 Va. 313, 358 S.E.2d 157, *cert. denied*, 484 U.S. 873 (1987) 10

TABLE OF CITATIONS – continued

Page

Gregg v. Georgia, 428 U.S. 153 (1976) 10, 16

Harris v. Reed, 894 F.2d 871 (7th Cir. 1990) 22

Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970) 15

Hoke v. Commonwealth, 237 Va. 303, 377 S.E.2d 595, *cert. denied*, 491 U.S. 910 (1989) 10

Jones v. Murray, 947 F.2d 1106 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1591 (1992) 9, 18, 20

Jones v. Murray, 976 F.2d 169 (4th Cir. 1992)..... 9

Jurek v. Texas, 428 U.S. 862 (1976) 11, 12

Lewis v. Jeffers, 497 U.S. 764 (1990) 19

Lockhart v. Fretwell, 113 S.Ct. 838 (1993) 8

Lowenfield v. Phelps, 484 U.S. 231 (1988) 11, 12

Maggio v. Williams, 464 U.S. 46 (1983) 10, 20

McAleese v. Mazurkiewicz, 1 F.3d 167 (3rd Cir. 1993) 22

Mickens v. Commonwealth, 247 Va. 395, 442 S.E.2d 678 (1994) 9

Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992), *cert. denied*, 113 S.Ct. 1880 (1993) 9

People v. Ortiz, 224 Ill. App. 3d 1065, 586 N.E.2d 1384 (1992) 22

Proffitt v. Texas, 428 U.S. 242 (1976) 13

Saffle v. Parks, 494 U.S. 484 (1990)..... 8

Satcher v. Virginia, 113 S.Ct. 1319 (1993) 10

Sawyer v. Smith, 497 U.S. 227 (1990)..... 8

TABLE OF CITATIONS – continued

Page

Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974) 15

Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979) 11

Smith v. Procunier, 769 F.2d 170 (4th Cir. 1985), *aff'd*, 477 U.S. 527 (1986) 9

Spencer v. Commonwealth, 238 Va. 563, 385 S.E.2d 850 (1989), *cert. denied*, 493 U.S. 1093 (1990) 10

Springfield v. Kibbe, 480 U.S. 257 (1987) 13

Stewart v. Commonwealth, 245 Va. 222, 427 S.E.2d 394, *cert. denied*, 114 S.Ct. 143 (1993) 9, 20

Stewart v. Virginia, 114 S.Ct. 143 (1993) 10

Strickland v. Washington, 466 U.S. 668 (1984) .. 22, 23, 24

Stringer v. Black, 112 S.Ct. 1130 (1992) 13

Swann v. Commonwealth, 247 Va. 222, 441 S.E.2d 195, *cert. denied*, 115 S.Ct. 234 (1994) 13

Teague v. Lane, 489 U.S. 288 (1989) 7

Texas v. Mead, 465 U.S. 1041 (1984) 21

Thomas v. Commonwealth, 244 Va. 1, 419 S.E.2d 606, *cert. denied*, 113 S.Ct. 421 (1992) 20

Tuilaepa v. California, 114 S.Ct. 2630 (1994) 11, 12, 13 17

Turner v. Bass, 753 F.2d 342 (4th Cir. 1985) 2, 9, 17

Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980) 2

Turner v. Commonwealth, 234 Va. 543, 364 S.E.2d 483 (1988) 3, 4, 14

TABLE OF CITATIONS – continued

Page

Turner v. Murray, 476 U.S. 28 (1986) 3

Turner v. Virginia, 486 U.S. 1017 (1988) 3

Turner v. Williams, 35 F.3d 872 (4th Cir. 1994) 4, 9, 15, 19, 22, 23

Turner v. Williams, 812 F. Supp. 1400 (E.D. Va. 1993) 4, 6, 15

United States v. Johnston, 268 U.S. 220 (1925) 21

United States v. McGill, 11 F.3d 223 (1st Cir. 1993) 22

United States v. Washington, 840 F. Supp. 562 (N.D. Ill. 1993) 22

Walton v. Arizona, 497 U.S. 639 (1990) 18, 19

Washington v. Murray, 952 F.2d 1472 (4th Cir. 1990) 9

OTHER AUTHORITIES

U.S.S.Ct. R. 10.1 21

U.S.S.Ct. R. 14.1(h) 13

Virginia Code § 19.2-264.4 6

No. 94-1238

In The

Supreme Court of the United States

October Term, 1994

WILLIE LLOYD TURNER,

Petitioner,

v.

JOHN JABE, WARDEN,
GREENSVILLE CORRECTIONAL CENTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 35 F.3d 872 (4th Cir. 1994). The opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, is reported at 812 F. Supp. 1400 (E.D. Va. 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are recited in the appendix to the petition at 175-178.

STATEMENT OF THE CASE

Petitioner was indicted by a Southampton County, Virginia grand jury for the capital murder of W. Jack Smith, Jr. on July 12, 1978.[1] After a change of venue, the trial was held in Northampton County. After a jury trial in which Turner was convicted on all counts, the trial court on February 6, 1980 sentenced him to death on the capital murder conviction.[2] Thereafter, the Supreme Court of Virginia affirmed. *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980). After petitioner unsuccessfully sought certiorari in this Court and habeas relief in the state courts and federal district court in Norfolk, he appealed to the Fourth Circuit, which affirmed the district court's denial of habeas relief. *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985).

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[1] Turner was charged under former § 18.2-31(d) of the Code of Virginia with the premeditated killing of Smith in the commission of a robbery while armed with a deadly weapon. Turner was also indicted for, and convicted of, use of a firearm in the commission of murder and possession of a sawed-off shotgun in the commission of robbery.

[2] All subsequent references to this trial as well as the direct appeal and state and federal habeas corpus proceedings stemming from it will hereinafter be designated as "*Turner I.*"

This Court then granted certiorari. While upholding Turner's capital murder conviction, the Court vacated his death sentence and ordered a new sentencing hearing. *Turner v. Murray*, 476 U.S. 28 (1986).

After the return of this case to the Circuit Court of Southampton County, the court again ordered a change of venue, this time to Prince Edward County. On January 12, 1987, after a four-day resentencing trial, the jury sentenced petitioner to death. On March 16, 1987, the trial court upheld the jury's sentence.[3] On appeal, the Supreme Court of Virginia again affirmed. *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483 (1988). This Court then denied certiorari. *Turner v. Virginia*, 486 U.S. 1017 (1988).

Turner then filed a habeas corpus petition in the Circuit Court of Southampton County. After conducting oral argument on respondent's motion to dismiss, the state court dismissed the majority of the allegations but ordered a plenary hearing on several ineffective counsel claims. The circuit court conducted the evidentiary hearing on September 11-13, 1989. On July 5, 1990, the circuit court dismissed the petition in its entirety. On September 5, 1990, the state court denied petitioner's motion for leave to amend the habeas petition and to modify the final order. The Supreme Court of Virginia denied Turner's petition for appeal by order dated April 30, 1991.

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[3] Further references to this resentencing proceeding as well as the direct appeal and state and federal habeas proceedings arising out of it will be designated as "*Turner II*."

Turner next filed a habeas corpus petition in the United States District Court in Alexandria. After conducting oral argument on respondent's motion to dismiss on August 28, 1992, the district court on February 1, 1993, entered an order denying the habeas petition. *Turner v. Williams*, 812 F. Supp. 1400 (E.D. Va. 1993). On appeal, the Fourth Circuit affirmed the district court's ruling. *Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994). On October 17, 1994, the Fourth Circuit denied rehearing. On October 24, 1994, the mandate of the Fourth Circuit issued.

STATEMENT OF FACTS

On July 12, 1978, petitioner entered Smith Jewelers located in Franklin, Virginia at about 11:20 a.m.[4] Using a sawed-off shotgun wrapped in a towel, Turner silently motioned the various customers and employees to line up against the counter of one side of the store and then forced the proprietor, W. Jack Smith, Jr., to stuff money from the cash register into some jewelry bags.[5] As he did this, Smith activated a silent alarm to the police department. Then, Mrs. Judith Cosby came into the store.

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[4] The facts relevant to the capital murder are recited in the opinion of the Supreme Court of Virginia on direct appeal in *Turner II*. *Turner v. Commonwealth*, 234 Va. at 546, 364 S.E.2d at 484-485.

[5] In the resentencing hearing, the Commonwealth read into evidence the verbatim testimony of the witnesses who had been present in the jewelry store in the minutes leading up to the murder of Jack Smith and who later testified in *Turner I*.

Petitioner likewise motioned her to go to the counter and kicked her as she did so.

Then, after Officer Alan D. Bain, Jr. came in and asked Smith why the alarm was on and whether anything was wrong, Turner forced him to give up his revolver. Turner put it in his pocket while continuing to hold the shotgun. Petitioner then made Smith turn the alarm off and fill up more jewelry bags with store merchandise.

Turner subsequently took the pistol from his pocket and put it in his right hand, switching the shotgun to his left hand. As he tossed the pistol, it discharged and the shot went towards the back of the store. After Bain assured Turner that no one was coming in the back, petitioner went to the middle of the room, "just looked at Mr. Smith and fired the [pistol] at" him, causing him to "yell like a puppy and [fall] to the floor. . . . " Smith fell down behind the counter and began bleeding from a head wound. While it did not cause Smith's death, the shot did injure his brain. Turner was about 12 to 15 feet from Smith when he "just pointed right at [him] and fired" without warning or provocation.

At this point, Officer Bain attempted to reason with Turner and promised to take him out of town if he would not shoot anyone else. Petitioner replied, however, that he was "going to kill that nigger for snitching on me." As Smith lay helpless and "gurgling" on the floor, Turner approached him, looked down at him over the counter, and shot him two times in the chest in a "rapid fire" manner. These shots caused Smith to jump; he did not move after that. Medical testimony established that either of these latter two shots would have been independently

fatal. Thereafter, Bain knocked the firearms away from petitioner and was able to subdue him until other police officers came to the scene.

After the Commonwealth rested, the defense presented no mitigating evidence, based on trial counsel's tactical judgment that any such evidence might be substantially outweighed by aggravating evidence put on in rebuttal by the Commonwealth. At the conclusion of the trial, the jury sentenced Turner to death, based solely upon a finding that the murder had been "vile." *See* § 19.2-264.4 of the Code of Virginia. On March 16, 1987, the trial court upheld the jury's sentence and imposed the death penalty.

Thereafter, as found by the state habeas circuit court, trial counsel, two highly experienced and able attorneys, diligently investigated available lay and expert mitigating evidence in preparation for the resentencing proceeding.[6] For example, counsel obtained substantial evidence as to Turner's role in the planning and execution of the escape of six Virginia death row inmates from Mecklenburg Correctional Center in May, 1984, and the attempted escape of Turner and several other death row prisoners in November, 1985. Counsel also examined petitioner's prison file and mental health records and interviewed several of Turner's relatives about his background. Trial counsel decided not to defend on the basis of any mental

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[6] The Fourth Circuit's opinion, which was based upon the state habeas court's factual findings as well as its own independent review of the record, recites the facts relevant to Turner's ineffective counsel claim. *Turner v. Williams*, 35 F.3d at 895-904. *See also Turner v. Williams*, 812 F. Supp. at 1430-1432.

health disorder; the habeas court found that Turner had no statutory or non-statutory mental health mitigating circumstance.

Finally, the state habeas circuit court found that counsel were prepared to put on both expert and lay evidence in mitigation. They made an informed decision to rest, however, without putting on any evidence, based primarily on their assessment that any evidence they might present would be overwhelmed by the rebuttal evidence which the Commonwealth had held back in its case-in-chief.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S ARGUMENT ATTACKING THE CONSTITUTIONALITY OF VIRGINIA'S STATUTORY VILENESS FACTOR IS A NON-REVIEWABLE "NEW RULE" UNDER *TEAGUE V. LANE*, 489 U.S. 288 (1989), AND ITS PROGENY.

Petitioner's challenge to Virginia's statutory vileness predicate is not cognizable under the "new rule" doctrine in *Teague v. Lane* and its progeny. In *Teague*, this Court ruled that new federal constitutional rules do not apply on federal habeas corpus review to cases which are final unless either of two narrow exceptions exists. This Court stated that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (emphasis in original). Subsequently, the Court has stated that while it has "offered various formulations of what constitutes a new rule, 'meaningfully for the majority of cases,' the

Teague definition of a new rule is the governing test. *Gilmore v. Taylor*, 113 S.Ct. 2112, 2116 (1993); *Butler v. McKellar*, 494 U.S. 407, 412 (1990). Thus, consistent with principles of comity and finality, the new rule doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts even if they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414. *See also Saffle v. Parks*, 494 U.S. 484, 488 (1990). So long as a decision "was susceptible to debate among reasonable minds" at the time the prisoner's conviction became final, it constitutes a new rule under *Teague*. *Graham v. Collins*, 113 S.Ct. 892, 902 (1993); *Butler*, 494 U.S. at 414.

In resolving "the determinative question [as to] whether reasonable jurists" who "survey[ed] the legal landscape as it then existed" at the time the prisoner's case became final would have been obligated to accept his claim, *Graham*, 113 S.Ct. at 898, 903, this Court has relied upon the existence of federal and state authority adverse to the prisoner's position as a basis for invoking *Teague*. *See, e.g., Caspari v. Bohlen*, 114 S.Ct. 948, 955-956 (1994); *Butler*, 494 U.S. at 414. This Court even has cited decisions which were against the weight of authority and *dissenting* opinions in its own earlier cases to hold that *Teague* barred review of a federal habeas claim. *See Sawyer v. Smith*, 497 U.S. 227, 236-241 (1990). Further, even cases decided after a prisoner's conviction has become final bear upon the *Teague* inquiry, so long as they were decided adversely to him. *See Bohlen*, 114 S.Ct. at 956; *Gilmore*, 113 S.Ct. at 2117; *Graham*, 113 S.Ct. at 900. *See also Lockhart v. Fretwell*, 113 S.Ct. 838 (1993). Finally, in considering a challenge to the constitutionality of jury

instructions, this Court has viewed the long-standing state practice of using such instructions as "strong evidence of the reasonableness of the interpretations given existing precedent by state courts." *Gilmore*, 113 S.Ct. at 2119 n.3.

Particularly in light of *Gilmore v. Taylor*, petitioner cannot satisfy *Teague*'s threshold test. First, in both *Turner I* and *Turner II*, as well as in numerous other cases involving similar challenges to the statutory vileness predicate by other Virginia death row prisoners, the Fourth Circuit regularly has upheld the constitutionality of this factor, both on its face and/or as applied. *See Turner v. Williams*, 35 F.3d at 891-894; *Turner v. Bass*, 753 F.2d at 350-353; *Jones v. Murray*, 976 F.2d 169 (4th Cir. 1992); *Bunch v. Thompson*, 949 F.2d 1354, 1366-1367 (4th Cir. 1991), *cert. denied*, 113 S.Ct. 20 (1992); *Jones v. Murray*, 947 F.2d 1106, 1116-1119 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1591 (1992); *Clozza v. Murray*, 913 F.2d 1092, 1105 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1123 (1991); *Boggs v. Bair*, 892 F.2d 1193, 1196-1197 (4th Cir. 1989), *cert. denied*, 497 U.S. 1043 (1990); *Smith v. Procunier*, 769 F.2d 170, 173-174 (4th Cir. 1985), *aff'd*, 477 U.S. 527 (1986); *Briley v. Bass*, 750 F.2d 1238, 1242-1246 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985). *See also Washington v. Murray*, 952 F.2d 1472, 1480 (4th Cir. 1990).

Similarly, the Supreme Court of Virginia consistently has rejected arguments much like Turner's. *See, e.g., Mickens v. Commonwealth*, 247 Va. 395, 403, 442 S.E.2d 678, 683-684, *vacated on other grounds*, 115 S.Ct. 307 (1994); *Stewart v. Commonwealth*, 245 Va. 222, 229, 427 S.E.2d 394, 399-400, *cert. denied*, 114 S.Ct. 143 (1993); *Mueller v. Commonwealth*, 244 Va. 386, 393, 422 S.E.2d 380, 385 (1992),

cert. denied, 113 S.Ct. 1880 (1993); *Spencer v. Commonwealth*, 238 Va. 563, 569, 385 S.E.2d 850, 853-854 (1989), *cert. denied*, 493 U.S. 1093 (1990); *Hoke v. Commonwealth*, 237 Va. 303, 305, 377 S.E.2d 595, 597, *cert. denied*, 491 U.S. 910 (1989); *Gray v. Commonwealth*, 233 Va. 313, 320-321, 358 S.E.2d 157, 161, *cert. denied*, 484 U.S. 873 (1987). This uninterrupted line of state and federal decisions upholding the constitutionality of Virginia's vileness circumstance demonstrates the applicability of *Teague* to this case.

Finally, less than four months ago, this Court rejected an almost identical attack upon Virginia's vileness predicate in *Breard v. Virginia*, 115 S.Ct. 1442 (1994). Likewise, this Court regularly has denied review of similar vileness arguments raised by other Virginia death row prisoners. *See, e.g., Stewart v. Virginia*, 114 S.Ct. 143 (1993); *Satcher v. Virginia*, 113 S.Ct. 1319 (1993); *George v. Virginia*, 112 S.Ct. 1591 (1992). Consequently, *Teague* mandates rejection of Turner's petition. *See Maggio v. Williams*, 464 U.S. 46, 51-52 (1983) (significance of prior denials of certiorari on same issue).

II. PETITIONER'S VILENESS ARGUMENT RAISES NO FEDERAL CONSTITUTIONAL ISSUE AND OTHERWISE IS NOT REVIEWABLE IN LIGHT OF HIS PROCEDURAL DEFAULT.

Turner asserts that Virginia's vileness circumstance is facially unconstitutional under *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Godfrey v. Georgia*, 446 U.S. 420 (1980). Further, the jury instruction on the "depravity of mind" component of the vileness factor, which the trial court

incorporated from the limiting language adopted in *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979), allegedly was too unclear to channel the sentencer's discretion by objective standards and genuinely to narrow the class of death-eligible murderers. Finally, the Supreme Court of Virginia on direct appeal in death penalty cases supposedly has compounded these claimed deficiencies by applying the vileness factor in an arbitrary, overly broad fashion.

Lowenfield v. Phelps, 484 U.S. 231 (1988), and *Tuilaepa v. California*, 114 S.Ct. 2630 (1994), demonstrate that Turner's arguments implicate no constitutional guarantees. In *Lowenfield*, this Court made clear that the only constitutional significance of statutory aggravating factors is to narrow the class of death-eligible murderers. This narrowing function, however, may be accomplished equally as well in the guilt phase. That is, a state's definition of capital murder may be sufficiently restrictive that its statutory aggravating factors in the penalty phase are constitutionally superfluous. Thus, in *Lowenfield*, this Court upheld a Louisiana death penalty even though the sole aggravating circumstance found in the sentencing stage repeated one of the elements of the capital crime. *See also California v. Ramos*, 463 U.S. 992, 1000 n.11 (1983); *Zant v. Stephens*, 462 U.S. 862, 869 (1983); *Jurek v. Texas*, 428 U.S. 262, 270-271 (1976).

In *Tuilaepa*, this Court stated that the Eighth Amendment addresses two primary concerns in capital sentencing schemes – the "eligibility decision" and the "selection decision." 114 S.Ct. at 2634. Turner's petition deals only with the former; a defendant constitutionally is eligible for the death penalty only upon conviction for an offense

for which it is an appropriate punishment. Eligibility for the death penalty requires the trier of fact to "convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase. The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)." *Tuilaepa*, 114 S.Ct. at 2634-2635 (citations omitted). Moreover, the aggravating circumstance cannot apply to every person convicted of murder but only to a subclass and, further, it cannot be unconstitutionally vague. 114 S.Ct. at 2635.

Turner was convicted of premeditated murder in the commission of robbery while armed with a deadly weapon. Consistent with *Lowenfield* and *Tuilaepa*, Turner's conviction for capital murder, which effectively incorporated several aggravators, provided the constitutionally necessary narrowing function, wholly apart from the findings of the jury in the penalty phase or the Supreme Court of Virginia on direct appeal.[7] *See California v. Ramos*, 463 at 995 n.1, 1008 (jury's finding during guilt phase of capital murder trial of special circumstance that murder had been committed during robbery was determination that defendant was eligible for death penalty, thereby leaving it free to determine whether death was appropriate punishment). *See also Jurek v. Texas*, 428 U.S. at 265-266 n.1 (statutory scheme upheld wherein one of

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[7] In his petition, Turner virtually concedes as much: "*Every* murder defendant eligible for the death penalty in Virginia . . . has committed a crime that is, by definition, willful, deliberate and premeditated. *Every* death-eligible murder is a crime surpassing other willful, deliberate and cruel acts against another." (Pet. at 20; citations omitted; emphasis in original).

five capital murders was intentional murder in course of robbery); *Proffitt v. Texas*, 428 U.S. 242, 248-249 (1976) (death penalty scheme constitutional in which one aggravator was murder committed during robbery). Because the premeditated murder during the armed robbery which Turner was found to have committed applied only to a subclass of murderers and because this category of capital murder clearly was not vague, any constitutional imperatives concerning the eligibility decision were satisfied. *Tuilaepa*, 114 S.Ct. at 2635.[8]

Further, even if Turner's vileness claim raised a federal constitutional question, it is fundamental that this Court will not review a claim which the petitioner failed to preserve in the state courts. *See Springfield v. Kibbe*, 480 U.S. 257 (1987); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). *See also* U.S.S.Ct. R. 14.1(h) (petitioner must demonstrate that federal question "was timely and properly raised so as to give this Court jurisdiction to review the judgment.").

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[8] Furthermore, even if Virginia's vileness factor were unconstitutional, because Virginia is a non-weighing State, *see Swann v. Commonwealth*, 247 Va. 222, 236-237, 441 S.E.2d 195, 205, *cert. denied*, 115 S.Ct. 234 (1994), Turner would not be entitled to relief. That is, the aggravators found when he was convicted of capital murder during the commission of an armed robbery render this issue academic. *See Stringer v. Black*, 112 S.Ct. 1130, 1137 (1992) ("In a non-weighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty."). *See also Tuilaepa*, 114 S.Ct. at 2642 (in non-weighing State, "we have not subjected aggravating circumstances to a vagueness analysis."). (Blackmun, J., dissenting).

At the resentencing, Turner did not object to Instructions 10 and 11, which repeated verbatim the Supreme Court of Virginia's limiting definitions of "aggravated battery" and "depravity of mind." Thereafter, on direct appeal in *Turner II*, Turner did not attack the vileness factor as facially unconstitutional[9] or challenge the limiting construction of the aggravated battery and depravity of mind components of the vileness circumstance. (App. 1-17). Concerning the latter component, Turner asserted only that depravity of mind should be construed to mean "a degree of moral turpitude and psychical debasement that *far* surpasses that inherent in the definition of legal malice and premeditation." (App. 12). (Emphasis in original). Petitioner expressly conceded that Virginia's limiting construction of depravity of mind could potentially provide principled differentiation between capital and non-capital cases. (App. 11).

Finally, on direct appeal, Turner presented virtually no argument that the scope of proportionality review by the Supreme Court of Virginia in death penalty cases is generally inadequate. Nor did petitioner, upon the State Supreme Court's decision in *Turner II*, seek a rehearing challenging the review of his own death sentence. Instead, Turner argued that his conduct did not amount to depravity of mind or aggravated battery within the meaning of the vileness predicate. (App. 8-11). Turner relied upon the brutality reflected in other Virginia death penalty cases to argue that the facts here were not equally "vile." (App. 9-16).

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[9] In fact, the Supreme Court of Virginia noted as much in *Turner II*. *See* 234 Va. at 552, 364 S.E.2d at 488.

When petitioner raised the present claims in his state habeas appeal, the Supreme Court of Virginia dismissed them as partly repetitive of his arguments on direct appeal, and thus not reviewable under *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), and partly new, and thus defaulted under *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974). (App. 18-19). *See also Turner v. Williams*, 812 F. Supp. at 1411-1414. The State Supreme Court's dismissal order corresponded, without exception, to respondent's arguments in his brief in opposition concerning which grounds were repetitious, which were defaulted, and which were a mixture of the two. Thus, no less than in *Coleman v. Thompson*, 111 S.Ct. 2546 (1991), the Supreme Court of Virginia unambiguously found the present claim defaulted. Accordingly, this Court should not review petitioner's defaulted claim.

III. VIRGINIA'S STATUTORY VILENESS PREDICATE, BOTH FACIALLY AND AS APPLIED TO THE FACTS OF THIS CASE, IS CLEARLY CONSTITUTIONAL.

Petitioner's challenge to the vileness circumstance, even if reviewable, has no merit. Instruction No. 1 informed the jury in *Turner II* that for it to sentence Turner to death, it must find beyond a reasonable doubt at least one of the two statutory aggravating factors, including that petitioner's conduct "in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim." *Turner v. Williams*, 812 F. Supp. at 1400 n.25. Incorporating the Supreme Court of Virginia's limiting construction of the vileness factor,

Instruction No. 10, without objection, defined an aggravated battery as one "which qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder." *Turner v. Williams*, 35 F.3d at 891. Likewise, Instruction No. 11, again without objection, defined depravity of mind as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Id.* The jury sentenced Turner to death based on its finding that the murder was "outrageously and wantonly vile, horrible, and inhuman in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the murder. . . . " (App. 20).

Turner first asserts that, consistent with *Gregg v. Georgia*, Virginia's vileness circumstance is facially vague and must be suitably limited by jury instructions and appellate review to pass constitutional muster. In upholding Georgia's identical vileness criterion in *Gregg*, however, this Court stated: "[T]here is no reason to think that juries will not be able to understand" this phrase. 428 U.S. at 202 n.54.

Petitioner's reliance upon *Godfrey* is equally baseless. There, the prosecution specifically conceded the absence of "torture" and "aggravated battery," and the jury merely found "that the offense of murder was outrageously or wantonly horrible and inhuman." 466 U.S. at 428. There was "nothing in these words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey*, 446 U.S. at 428. Moreover, on direct appeal, the Georgia Supreme Court did not apply its own previous limiting

construction of the Georgia vileness factor. 446 U.S. at 429-432. Under these attendant circumstances, this Court held that the State Supreme Court had construed the vileness criterion too broadly. 446 U.S. at 432. *See also Turner v. Bass*, 753 F.2d at 350-353.

This Court made clear in *Tuilaepa* that "our vagueness review is quite deferential. . . . [A] factor is not unconstitutional if it has some 'common-sense core of meaning. . . . that criminal juries should be capable of understanding. . . . ' " 114 S.Ct. at 2635-2636. This Court's holding in *Arave v. Creech*, 113 S.Ct. 1534 (1993), reflects this deferential approach. In *Creech*, the trial court found as an aggravating factor that the petitioner had "by the murder . . . exhibited utter disregard for human life." 113 S.Ct. at 1539. On direct appeal, the Idaho Supreme Court affirmed this finding after applying its limiting construction of "utter disregard" to include "acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." 113 S.Ct. at 1539. This Court concluded that this limiting language adequately narrowed the class of murderers eligible for the death penalty.[10]

Consistent with *Tuilaepa* and *Creech*, the definition of "depravity of mind" given to the jury in *Turner II* was constitutionally sufficient. The State Supreme Court's

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[10] It is important to note that in sharp contrast to the case at bar, Idaho defined capital murder very broadly. 113 S.Ct. at 1542-1543. Thus, the aggravator at issue in *Creech* had overriding constitutional significance, unlike the vileness factor in *Turner II*.

limiting construction of this term stressed the aspects of a defendant's state of mind that distinguish him from an "ordinary murderer" in terms of malice and premeditation. This concept of extreme moral turpitude and debasement, like Arizona's "depraved" factor, *Walton v. Arizona*, 497 U.S. 639, 655 (1990) ("relishes the murder, evidencing debasement or perversion"), and Idaho's "utter disregard" circumstance, *Creech*, 113 S.Ct. at 1541 ("cold blooded" and "pitiless"), adequately guides the sentencer even though the definition may be not "susceptible to mathematical precision." *Walton*, 497 U.S. at 655. As in *Creech*, the depravity of mind component focused on the objective issue of Turner's state of mind rather than the "pejorative adjectives . . . that describe[d his] crime as a whole. . . . " 113 S.Ct. at 1541. Viewing this term in conjunction with the specific and narrow "torture" and "aggravated battery" components, the jury in *Turner II* clearly understood that it did not have unfettered discretion to impose the death penalty.

In *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991), the Fourth Circuit specifically rejected the death row prisoner's argument that the *Smith* limiting construction of "depravity of mind" was unintelligible to an average juror. 947 F.2d at 1119. This Court should not second guess the Fourth Circuit's conclusion. *See Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (deference warranted because lower federal courts "are better schooled in and more able to interpret the law of their respective States").

Moreover, wholly apart from the adequacy of the jury instructions on the vileness factor, the State Supreme Court's review of Turner's death sentence in *Turner II* served to accomplish the narrowing of the death-eligible

class of murderers. *See Walton v. Arizona*, 497 U.S. at 653-655; *Coleman v. Thompson*, 895 F.2d 139, 146-147 (4th Cir. 1990). The State Supreme Court's findings concerning the vileness predicate were rational and supported by the evidence. *See Lewis v. Jeffers*, 497 U.S. 764, 780-783 (1990).

Turner's complaints concerning the appellate review undertaken by the Supreme Court of Virginia, both in this case and in death penalty cases generally, is belied by his own prior characterization of such review. In the Fourth Circuit, Turner argued that the facts of this case bore "no resemblance to the remarkably violent behavior typical in death penalty cases under the [Virginia] vileness factor" or "the pattern of extraordinary brutality typical of vileness cases. . . . " (App. 21-25). The Fourth Circuit noted as much in rejecting Turner's claim that Virginia imposes the death penalty arbitrarily and capriciously. *Turner v. Williams*, 35 F.3d at 893 n.20.

Moreover, this Court made clear in *Creech* that the type of complaints advanced by Turner against the Supreme Court of Virginia's appellate review of death sentences is inapposite. There, this Court stated:

> That the Idaho courts may find first-degree murderers to be 'cold-blooded' and 'pitiless' in a wide range of circumstances is unsurprising. It is also irrelevant. . . . We did not undertake a comparative analysis of state court decisions in *Walton*. . . . Under our precedents, a federal court may consider state court *formulations* of a limiting construction to ensure that they are consistent. But our decisions do not authorize review of state court cases to determine whether

> a limiting construction has been *applied* consistently.

113 S.Ct. at 1543, 1544 (emphasis in original).

No less than the Idaho Supreme Court in *Creech*, the Supreme Court of Virginia consistently has invoked and applied the limiting construction of "depravity of mind" in death penalty cases. *See, e.g., Stewart v. Commonwealth*, 245 Va. 222, 245-247, 427 S.E.2d 394, 409, *cert. denied*, 114 S.Ct. 143 (1993); *Thomas v. Commonwealth*, 244 Va. 1, 25, 419 S.E.2d 606, 619-620, *cert. denied*, 113 S.Ct. 421 (1992). The Supreme Court of Virginia's determination in *Turner II* that the Commonwealth's evidence proved the depravity of mind component of the vileness factor under the *Smith* limiting definition was entirely consistent with its approach in death penalty cases generally. In this regard, the Fourth Circuit specifically upheld the adequacy of the appellate review undertaken by the State Supreme Court in *Turner II*. *See also Jones v. Murray*, 947 F.2d at 1118.

Finally, this Court regularly has denied certiorari review on almost identical attacks upon Virginia's vileness circumstance. (See page 10 of this Brief). Thus, as in *Maggio v. Williams*, where this Court refused to stay an execution in Louisiana to consider a proportionality review argument much like those unsuccessfully raised by other Louisiana prisoners, this Court's previous denials of certiorari are "ample evidence that [it does] not believe" that the present petition justifies the granting of certiorari. 464 U.S. at 51-52.

IV. PETITIONER'S INEFFECTIVE COUNSEL CLAIM IS TOO FACT-SPECIFIC AND TOO INSUBSTANTIAL TO WARRANT REVIEW BY THIS COURT.

Petitioner complains that trial counsel unreasonably chose not to present mitigating evidence at the resentencing proceeding which he had promised the jury in his opening statement. Further, Turner attacks this failure, in part, as the product of trial counsel's allegedly inadequate pretrial investigation and challenges counsel's failure to introduce a case in mitigation as unreasonably foregoing "[c]ompelling" mitigating evidence. (Pet. at 24).

This argument clearly is inadequate to warrant this Court's discretionary review. Certainly, Turner offers no special or important reasons for the granting of certiorari. Moreover, the Court does "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See also Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.); U.S.S.Ct. R. 10.1. Thus, petitioner's complaints against counsel, which focus upon the adequacy of their pretrial investigation and reasonableness of their decision to rest without putting on mitigating evidence, are too fact-specific to justify the granting of certiorari.

Further, Turner's contention that certiorari is appropriate to resolve an alleged conflict between various circuits concerning whether the failure to present evidence recited in the opening statement is *per se* ineffective representation has no merit. Petitioner's reliance upon *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), is misplaced. (Pet.

at 23-24).[11] As the Fourth Circuit pointed out in *Turner v. Williams*, 35 F.3d at 903-904, the First Circuit in *United States v. McGill*, 11 F.3d 223 (1st Cir. 1993), clarified its prior holding in *Anderson*, holding that "the determination of inefficacy [concerning counsel's failure to present a promised witness] is necessarily fact-based." 11 F.3d at 227. Thus, the alleged conflict between the lower courts concerning the impact of an attorney's failure to present promised evidence is non-existent.[12]

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[11] A cursory review of the other cases cited by Turner readily establishes that none of them dispensed with the two-pronged test for determining an ineffective counsel claim established in *Strickland v. Washington*, 466 U.S. 668 (1984). For example, in *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990), the Seventh Circuit applied *Strickland* and concluded that "[u]nder the circumstances" counsel's "overall performance" was constitutionally ineffective representation. 894 F.2d at 878. *See also McAleese v. Mazurkiewicz*, 1 F.3d 159, 167 (3rd Cir. 1993) (failure to produce evidence promised in opening statement was "not necessarily ineffective"); *United States v. Washington*, 840 F. Supp. 562, 576 (N.D. Ill. 1993) ("based on the facts," counsel's failure to present witness mentioned in opening statement was not ineffective under either prong of *Strickland*); *People v. Ortiz*, 224 Ill. App. 3d 1065, 1072, 586 N.E.2d 1384, 1389 (1992) (defense counsel's failure to present promised witness, which resulted in part from his misunderstanding concerning proper scope of cross-examination and redirect examination, was ineffective under *Strickland* test).

[12] Even if *Anderson* still was the First Circuit's view on this issue, it would be too slender a reed to warrant the granting of certiorari. As then-Judge Breyer noted in his dissent in *Anderson*, the majority holding which presumed prejudice as a matter of law cannot be reconciled with *Strickland*'s fact-based inquiry. 858 F.2d at 22 (Breyer, J., dissenting).

Finally, both the Fourth Circuit and the district court carefully reviewed the state record, including the lengthy findings of fact of the state habeas circuit court, and concluded that defense counsel's pretrial investigation of mitigating evidence had been effective and that their decision to rest at the resentencing without putting on a case in mitigation had been reasonable. 35 F.3d at 894-904; 812 F. Supp. at 1428-1432. Likewise, both lower courts properly concluded that Turner had not been prejudiced under *Strickland* by counsel's actions. 35 F.3d at 896-898; 812 F. Supp. at 1429-1432. The record overwhelmingly establishes the thoroughness of defense counsel's pretrial investigation as well as the reasonableness of their decision to rest without formally introducing mitigating evidence; thus Turner has provided no justification for this Court's review of his unremarkable *Strickland* claim.

CONCLUSION

Petitioner's arguments against the vileness circumstance raise no federal constitutional issue, are not cognizable under the new rule and procedural default doctrines, and otherwise advance no significant federal constitutional question. Likewise, petitioner's garden-variety ineffective counsel contention raises nothing more than a routine *Strickland* claim. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 870554

WILLIE LLOYD TURNER,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

1. Is the Virginia death penalty statute unconstitutionally vague and overbroad, in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

2. Was the trial court permitted to sentence Appellant Willie Lloyd Turner to death after remand for penalty phase error?

3. Does this Court provide adequate appellate review of death sentences?

4. Is Virginia's death penalty statute applied in a racially discriminatory fashion against blacks who have killed whites?

5. Did the trial court err in refusing to exclude juror Samuel Lambert for cause?

6. Should the trial court have allowed evidence, argument or instruction concerning parole eligibility?

7. Should the trial court have instructed the jury as to the "vileness" aggravating circumstance, or as to the "aggravated battery" or "depravity of mind" prongs of that aggravating circumstance?

8. Did the trial court err in refusing Appellant's proposed instructions 1A, 1B, 1C, 1D and 1E?

9. Should the trial court have allowed Appellant to argue to the jury that the Appellant would be sentenced to die in the electric chair, after the prosecution had referred to electrocution both in *voir dire* and earlier in its own argument?

10. Is the death sentence in this case disproportionate, or was it imposed under the influence of passion or prejudice?

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Appellant's Motion for a Life Sentence, which motion was based upon the following allegations:

a. That the Virginia death penalty statute is unconstitutionally vague and overbroad in its definition of aggravating circumstances, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

b. That the trial court could not resentence Turner to death, according to this Court's decision in *William Patterson v. Commonwealth.*

c. That the failure of the Virginia courts to afford adequate appellate review of death sentences means that death sentences are being imposed in Virginia in an arbitrary and capricious manner, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

d. The Virginia death penalty statute is applied in a racially discriminatory fashion against people like Appellant, a black man who killed a white man.

2. The trial Court's refusal to exclude juror Samuel Lambert for cause violated Appellant's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution to have an impartial jury capable of

deciding whether to impose the death sentence free of any arbitrary or prejudicial factors.

3. The trial court erred in refusing to allow evidence or argument concerning parole eligibility, resulting in arbitrary and capricious infliction of the death sentence, in violation of Appellant's Eighth and Fourteenth Amendment rights.

4. The trial court erred in refusing to grant Defendant's proposed instructions 1A, 1B, 1C, 1D and 1E, as a result of which the death setnence [sic] was imposed against Appellant in an arbitrary and capricious manner, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

5. The trial court erred in refusing to allow Appellant to make argument concerning the fact that the Appellant would be sentenced to die in the electric chair, a restriction which, after the prosecution had referred to electrocution both in *voir dire* and earlier in argument, violated due process and resulted in the death sentence being imposed arbitrarily and capriciously, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

6. The trial court erred in allowing the jury to be instructed on the issue of aggravated battery, depravity of mind or the "vileness" criterion.

7. The death sentence in this case is disproportionate, and constitutes cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

* * *

III.

THE MURDER OF JACK SMITH WAS NOT "VILE" WITHIN ANY CONSTITUTIONAL MEANING OF THE VIRGINIA CAPITAL SENTENCING STATUTE.

The jury on resentencing based the imposition of the death sentence only on the vileness of the crime, and did not make a finding of future dangerousness. Judge Godwin had instructed the jury on both aggravating circumstances, over the objection of the defense,[2] and had instructed the jury as to both the aggravated battery and the depravity of mind prongs of the vileness test.

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[2] This argument encompasses four objections:

1. The Virginia death penalty statute in general, and the "vileness" criterion in particular, are unconstitutionally vague and overbroad in that they do not channel the jury's discretion, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

2. The application of the Virginia death penalty statute to the facts of this case to support the imposition of this death sentence renders the statute unconstitutional as applied.

3. Under this Court's precedents, Willie Turner cannot be sentenced to death for the reasons given by the jury.

4. If this Court fails to reverse the jury's verdict, the Court will have failed to provide adequate appellate review of the propriety of the death sentence.

These issues are very closely interrelated, and will not be argued in separate, numbered paragraphs or arguments.

A. The Language Of The "Vileness" Criterion Is Intrinsically Vague And Overbroad, And Can Be Constitutional Only If The State Appellate Court Restricts Its Application To Cases "At The Core."

Virginia's "vileness" criterion is identical to Georgia's §27-2534.1(b)(7), which was approved by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The Court there rejected the argument that §(b)(7) was so overbroad that it could support the death penalty in any murder case.

> It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction. In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of [§(b)(7)], see *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974), and that homicide was a horrifying torture-murder.

428 U.S. at 201 (Stewart, Powell, and Stevens, JJ.) The Court went on to praise the Georgia Supreme Court for the careful review that it was giving to death sentences, noting that that court had held that §27-2534.1(b)(1) was impermissibly vague, *see Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976), and that the Georgia Supreme Court had reversed a jury's finding that the defendant had created a "great risk of death to more than one person" when the victim had simply been kidnapped in a parking lot. *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975).

Four years later, the United States Supreme Court reviewed the performance of the Georgia Supreme Court in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In response to defense claims that the Georgia courts' application of §(b)(7) to Godfrey's case invalidated the entire statutory scheme, the United States Supreme Court instead reiterated its support for the Georgia Supreme Court's narrowing constructions, but found that the failure of the court to apply those narrowing constructions to Godfrey's case required that the death sentence be set aside.

> In past cases the State Supreme Court has apparently understood this obligation as carrying with it the responsibility to keep §(b)(7) within constitutional bounds. Recognizing that "there is a possibility of abuse of [the §(b)(7)] statutory aggravating circumstance," the court has emphasized that it will not permit the language of that subsection simply to become a "catchall" for cases which do not fit within any other statutory aggravating circumstance. *Harris v. State*, 237 Ga. 718, 732, 230 S.E.2d 1, 10 (1976). Thus, in exercising its function of death sentence review, the court has said that it will restrict its "approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core." *Id.*, at 733, 230 S.E.2d, at 11.

446 U.S. at 429.

Godfrey is cited in support of many different propositions, many of them not supported by a close reading of the case. For example, *Godfrey* does not stand for the

proposition that one who kills his victims instantaneously, with one gunshot, can never be sentenced to death under Virginia's vileness criterion; *Godfrey* says only that such a crime is not vile under Georgia law, and that the failure of the Georgia courts to apply Georgia law can constitute a violation of the Eighth Amendment.

Likewise, we do not argue here that *Godfrey* requires this Court to conclude that Turner's crime was not vile. The significance of *Godfrey* is that it reiterates the importance of clear jury instructions and critical appellate review to make sure that such an intrinsically vague test as that in the "vileness" test does not become an unprincipled "catchall." Virginia is not constitutionally required to construe the "aggravated battery," "depravity of mind," and "torture" prongs *in pari materia*, as did the Georgia courts, but Virginia is constitutionally required to restrict the use of its vileness test to cases that "lie at the core."

B. Turner's Case Does Not "Lie At The Core" Of Death Penalty Cases.

1. This is not a case involving depravity of mind.

When this Court reviewed Turner's death sentence in 1980, the Court found that the aggravated battery criterion was supported, but did not approve the finding of depravity of mind. *Turner v. Commonwealth*, 221 Va. 513, 527, 273 S.E.2d 36 (1980). No additional evidence concerning the crime was adduced at this hearing, so the trial court should have been bound by this Court's earlier

opinion on the subject. Turner's mental state exhibited a degree of psychical debasement equal to that inherent in any capital murder under Virginia law, but the degree of "psychical debasement" did not surpass that present in any malice murder. There was no evidence that Turner had planned the murder; he just wanted to rob the store. That distinguishes Turner from, for example, Linwood Briley, of whom it can be said that not only the robbery but also the murder had been thought out ahead of time. *L. E. Briley v. Commonwealth*, 221 Va. 532, 273 S.E.2d 48 (1980). He did not kill Jack Smith on his way out of the store, his purpose having been achieved. *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985). He did not obtain sexual gratification from what he had done. *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983).

In this Court's other "depravity of mind" cases, the depravity of mind and malice far transcend that found in the case of the frustrated jewelry store robbery. These are cases in which the jury could logically conclude that the defendant had formed the intent to kill before he began his criminal activity – cases in which the act of robbery was complete and the getaway sure, but where the defendant took the time to make sure that he killed the victim. *See, e.g., L. E. Briley v. Commonwealth*, 221 Va. 532, 273 S.E.2d 48 (1980); *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985).

There is no evidence in this case that Turner planned, with a malice surpassing that inherent in the ordinary legal definition of murder, to kill Jack Smith. The evidence is that he killed Jack Smith out of panic and anger and frustration, a situational response rather than a long-thought-out response. He clearly premeditated, and with

malice intended to kill Jack Smith, but that was a decision made with police sirens wailing in the background in the middle of the robbery, rather than a decision made before the robbery started, or after it was essentially complete.

It was error to instruct the jury on depravity of mind.

2. Although this case appears to meet the standards set forth in earlier case law for aggravated battery, those standards should be tightened.

Under the precedents of this Court, Turner's crime would seem to constitute an "aggravated battery". The 1980 opinion of this Court seems to base the finding of aggravated battery on the number of gunshots and the fact that Jack Smith did not die instantaneously. 221 Va. at 527; see also *Watkins, supra,* 331 S.E.2d at 437.

Virginia case law since 1977 has many cases of vileness that are truly "at the core," to use the phrase sanctioned by the United States Supreme Court. *See, e.g., Smith v. Commonwealth,* 219 Va. 455, 248 S.E.2d 135 (1978) (rape-murder where victim was choked, stabbed and drowned); *Waye v. Commonwealth,* 219 Va. 683, 251 S.E.2d 202 (1979) (rape-murder, 42 stab wounds and victim beaten beyond recognition); *Mason v. Commonwealth,* 219 Va. 1091, 254 S.E.2d 116 (1979) (rape-murder, victim hit in head, abdomen with axe, sexually abused with axe, nailed to chair and set afire); *Fitzgerald v. Commonwealth,* 223 Va. 615, 292 S.E.2d 798 (1982) (rape-robbery-murder, victim cut at least 184 times); *Pruett v. Commonwealth,* 232 Va. 266, 351 S.E.2d 1 (1986) (rape-murder with at least 29 stab wounds).

In each of the above cases, and other cases that are truly "at the core," the physical abuse to the victim was *far* beyond the minimum necessary to accomplish a murder – enough so that a jury could reasonably conclude that the defendant *enjoyed* what he was doing.

3. This Court must adopt stricter standards for defining and applying the vileness aggravating circumstance.

This Court has made a start to complying with *Gregg* and *Godfrey* by formulating standards that could afford a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433. The definitions of "aggravated battery" and "depravity of mind" enunciated in *Smith* can, if strictly applied, provide that principled distinction. The important factor in applying either definition is the degree to which an aggravated battery must exceed the minimum battery necessary to kill, or the degree to which the killer's mind must exceed that malice inherent in first-degree murder. The United States Supreme Court has suggested that, to deserve the death penalty for vileness alone, the killer should display a consciousness *materially* more depraved than that of any person guilty of murder. *Godfrey, supra,* at 432. A bright-line rule that one gunshot means a life sentence but two gunshot wounds means a death sentence trivializes the decision. Two gunshots do not necessarily "reflect a consciousness materially more 'depraved' than" the use of a single bullet. *Godfrey, supra,* at 432.

This Court should make clear that an aggravated battery must be one which, qualitatively and quantitatively, is *much more vile than* the minimum necessary to accomplish the act of murder, and that "depravity of mind" is a degree of moral turpitude and psychical debasement that *far* surpasses that inherent in the definition of legal malice and premeditation.

* * *

VIII.

IMPOSITION OF THE DEATH SENTENCE IN THIS CASE WOULD BE DISPROPORTIONATE TO THE CRIME, IN VIOLATION OF THE EIGHTH AMENDMENT, AND WOULD BE EVIDENCE OF PASSION OR PREJUDICE.

The jury did not find that Willie Turner would be dangerous in the future, though they found that the crime was outrageously or wantonly vile, horrible and inhuman in that it involved depravity of mind and aggravated battery. When last this Court considered the proportionality of a death sentence on Willie Turner, it had both aggravating circumstances to consider. Now the question is whether juries in Virginia typically impose the death sentence on a person like Willie Turner.

The starting point for the analysis must be a comparison with other cases in which only vileness was found.

It is obvious, after reviewing the cases, that Turner's crime was by far the least vile of any "vileness only" cases to come to this Court.

1. *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202, *cert. denied*, 444 U.S. 924 (1979) (rape-murder, 42 stab wounds, victim beaten beyond recognition).

2. *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980) (murder for hire, victim shot five times with hollow-point bullets at close range, murder planned for days, celebrated murder with girlfriend).

3. *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103 (1980) (robbery-murder, defendant choked victim, slammed her head against floor with such force that five teeth were scattered around the house).

4. *Justus v. Commonwealth*, 222 Va. 667, 283 S.E.2d 905 (1981), *cert. denied*, 455 U.S. 983 (1982) (rape-murder of pregnant woman, victim shot twice in the face and once in the back of the head at close range).

5. *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162, *cert. denied*, 459 U.S. 882 (1982) (robbery-murder, death caused either by stabbing or strangulation with rope, which was followed by jamming umbrellas into rectum and vagina).

6. *Fitzgerald v. Commonwealth*, 223 Va. 615, 292 S.E.2d 798 (1982), *cert. denied*, 459 U.S. 1228 (1983) (rape-robbery-murder, victim cut with both machete and knife, at least 184 times).

7. *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271, *cert. denied*, 464 U.S. 977 (1983) (robbery-murder, murder and robbery planned days in advance, defendant shot victim in head, had sexual orgasm, watched her die

on the floor while he drank her wine and listened to music, garrotted her and then hanged her from doorknob with scarf).

8. *LeVasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644 (1983), *cert. denied*, 464 U.S. 1063 (1984) (robbery-murder, victim stabbed at least 43 times with ice pick and carving fork, back of head crushed, defendant tried to burn body).

9. *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984), *cert. denied*, 472 U.S. 1012 (1985) (double robbery-murder, one victim killed with one shot at close range to head, other victim tied up, shot at point-blank range in face, doused with accelerant, set afire, locked in closet, death from smoke inhalation).

10. *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 (1984) (rape-murder, victim raped, stabbed 38 times, left to bleed to death, all in the presence of her two children).

11. *Boggs v. Commonwealth*, 229 Va. 501, 331 S.E.2d 407 (1985) (robbery-murder, victim hit with heavy metal bar six times in head, several times in neck, death caused by repeated stabs, one of which finally punctured the heart).

12. *Wise v. Commonwealth*, 230 Va. 322, 337 S.E.2d 715 (1985) (robbery-murder, victim beaten, skull fracture, three fingers broken, flesh torn from face, gunshot to head, shotgun blast to chest, death came from drowning in outdoor toilet).

13. *Pruett v. Commonwealth*, 232 Va. 266, 351 S.E.2d 1 (1986) (rape-robbery-murder, victim tied up, stabbed 29 times).

14. *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352 (1987) (robbery-murder, victim choked into unconsciousness, put in trunk of car, driven around, pulled out, kicked in face, defendant then threw knife deep into victim's chest twice).

The only case in the above list that is even close to *Turner* in the nature of the battery is *Clark* (where five hollow-point bullets were used), but Clark's depravity of mind was far greater – his was a murder for hire.

It is useful to narrow down even further the class of comparable cases to robbery-murders where only vileness was found. That class of cases consists of *Whitley, Bunch, LeVasseur, Boggs, Wise,* and *Correll,* all of which are cases that show a true desire to torture – the defendant went out of his way to mutilate the body. Interestingly, none of the robbery-murders where only vileness was found is a case in which the victim was a store operator. Only in *Correll,* where the defendant told a friend that they had "killed a faggot for the car," does robbery or larceny seem to have been the primary motive; in each of the other five, it seems apparent that the primary motive was murder, and the fact that property was taken was secondary.

The standard "holdup and murder" cases apparently receive the death sentence only if both aggravating circumstances are found, and usually only if more than one person is killed. *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979); *Edmonds v. Commonwealth*, 229 Va. 303,

329 S.E.2d 807 (1985); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985); *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985).

It appears that Virginia juries draw a distinction between the street robbery and the robbery in the home. Robberies in the home are much more readily punished by death, wehreas [sic] robberies from stores are not.

Perhaps the case that is the closest to *Turner* on its facts is *Ball v. Commonwealth*, 221 Va. 754, 273 S.E.2d 790 (1981), in which Ball's conviction was reversed because he committed only an attempted robbery. Ball tried to hold up a store, but the Assistant Manager refused to give him any money. A struggle ensued, during which three or four shots were fired from Ball's pistol. The Assistant Manager died of his wounds. Ball testified that he had gone to the store intending to rob, but not to kill. The jury gave Ball a life sentence.

Another robbery-murder resulted in a capital murder conviction and a life sentence. in [sic] *Simpson v. Commonwealth*, 227 Va. 557, 318 S.E.2d 386 (1984), the jury sentenced Simpson to life for robbing and fatally stabbing a cab driver. Again, money, not murder, seemed to be the motive; Simpson had been armed with a sawed-off shotgun (like Turner had been), but used a knife instead as he stole the driver's money.

Virginia juries do not customarily return a death sentence for a robbery-murder such as the one at issue here. Willie Turner's death sentence should be overturned as disproportionate to the crime.

CONCLUSION

For the reasons stated above, Willie Turner's death sentence should be vacated.

WILLIE LLOYD TURNER

By Counsel

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond, on Tuesday the 30th day of April, 1991.

Willie Lloyd Turner, Appellant,

against Record No. 901335
Circuit Court No. CL-141-88 (H.C.)

David Williams, Warden,
Powhatan Correctional Center, Appellee.

From the Circuit Court of Southampton County

Upon review of the record and consideration of the petition for appeal filed herein, the brief in opposition and the appellant's reply brief filed in response thereto, the Court finds there is no reversible error in the judgment appealed from. Applying the rule in *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations numbered IV, VI, X, and XII in his petition for writ of habeas corpus, and to the extent allegations numbered VII, VIII, XIV, XV, and XVI in his petition for writ of habeas corpus advance matters not asserted on directed appeal; and, applying the rule in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), to allegations numbered VII, VIII, XIV, XV, and XVI in his petition for writ of habeas corpus to the extent that they advance matters asserted on direct appeal, the petition for appeal is denied for reasons of procedural default. *Harris v. Reed*, 389 [sic] U.S. 255 (1989).

Finding no merit in petitioner's allegations of ineffective assistance of counsel, the Court refuses the petition for appeal as to those allegations. *Strickland v. Washington*,

466 U.S. 668 (1984). The petitioner's remaining allegations are dismissed as meritless.

The said circuit court shall allow court-appointed counsel a total fee of $300 plus their costs and necessary direct out-of-pocket expenses.

A Copy,

Teste:
David B. Beach, Clerk

By: /s/ Illegible
Deputy Clerk

* * *

THE CLERK: "We, the jury on the issues joined, the defendant having been found guilty of capital murder in the commission of a robbery, having unanimously found that the conduct in committing the offense is outrageous and wantonly vile, horrible, and inhuman in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the murder, [p. 550] and having considered the evidence in mitigation of the offense, unanimously fix the punishment at death." Signed by the foreman, William Powers, III.

* * *

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

RECORD NO. 93-4001

WILLIE LLOYD TURNER,

Petitioner/Appellant,

v.

DAVID A. WILLIAMS,
Warden, Powhatan Correctional Center,

Respondent/Appellee.

BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

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* * *

which was considerably more violent than the crime in Petitioner's sentencing. Yet each of these defendants was sentenced to life imprisonment while Petitioner received a capital sentence solely on the basis of the vileness of the crime. In fact, there is no legitimate basis for distinguishing Petitioner's case from those in which the defendants received the lesser sentence.

Furthermore, the Commonwealth cannot justify the imposition of the death penalty on the basis that Petitioner's case resembles other crimes for which Virginia juries generally approve capital punishment. The crime in this case bears no resemblance to the remarkably violent behavior typical in death penalty cases under the vileness factor.[19] In fact, the

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[19] To date, approximately 42 capital cases in Virginia have involved the vileness aggravating factor. The vast majority of these cases have involved fact patterns demonstrating significantly greater brutality than Petitioner's actions. *See, e.g., George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991), *cert. denied*, 112 S. Ct. 1591 (1992) (defendant sodomized child victim and used stun gun on victim's penis); *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227, *cert. denied*, 112 S. Ct. 386 (1991) (defendant abducted victim, stripped her, beat her, and sexually assaulted her before killing her by crushing her head in four places with large rock); *Stockton v. Commonwealth*, 241 Va. 192, 402 S.E.2d 196, *cert. denied*, 112 S. Ct. 280 (1991) (defendant shot victim and cut off his hands at the wrists while victim still alive); *Bennett v. Commonwealth*, 236 Va. 448, 374 S.E.2d 303 (1988), *cert. denied*, 490 U.S. 1028 (1989) (over extended period, bound victim suffered repeated blows to head and face, was stabbed four times and strangled); *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352, *cert. denied*, 482 U.S. 931 (1987) (defendant choked victim, robbed him, kicked him in face several times and used unconscious body as target for knife-throwing); *Wise v. Commonwealth*, 230 Va. 322, 337 S.E.2d 715 (1985), *cert. denied*, 475 U.S. 1112 (1986) (defendant struck victim's head

Virginia Supreme Court acknowledged this fact when reviewing Petitioner's case. 364 S.E.2d at 490.

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repeatedly, broke three of victim's fingers, tore flesh from nose and forehead, shot victim in eyeball, threw victim in outdoor toilet and fired shotgun in victim's chest); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815, *cert. denied*, 474 U.S. 865 (1985) (defendant tortured one victim before shooting her in back of head after he ordered her to walk away from him and defendant stripped second victim, raped her, shot her in head and flung her nude body into parking lot); *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984), *cert. denied*, 472 U.S. 1012 (1985) (defendant tied one victim's hands behind her, stuffed sock down her throat, tape mouth and neck, forced her in closet, shot her point blank, doused her with accelerant and set her on fire, and left her still alive and breathing to die of smoke inhalation; attempted to incinerate second victim); *Clozza v. Commonwealth*, 228 Va. 124, 321 S.E.2d 273 (1984); *cert. denied*, 469 U.S. 1230 (1985) (defendant beat 13-year-old victim for over two hours, raped her and penetrated her vagina with twigs and large cylindrical object before internal bleeding suffocated her); *Fitzgerald v. Commonwealth*, 223 Va. 615, 292 S.E.2d 798 (1982), *cert. denied*, 459 U.S. 1228 (1983) (defendant inflicted 184 stab wounds with machete and knife, all sustained before victim's death); *LeVasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644 (1983), *cert. denied*, 464 U.S. 1063 (1984) (victim sustained at least 43 wounds and lacerations; back of head crushed by blows with blunt instrument; ice pick and two-pronged carving fork found protruding from victim's back; victim's ankles bound together; liquid bleach poured over body; and attempt to incinerate body); *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162, *cert. denied*, 459 U.S. 882 (1982) (defendant confessed to choking 63-year-old widow with bare hands, strangling her with rope, and cutting her throat; victim was found with one umbrella inserted into her vagina and another in her rectum); *Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980) (defendant raped woman in front of husband and child, after which woman was shot in head four times while family watched, husband was then shot in front of child, and finally child was shot); *Mason v.*

Furthermore, though defendant need not prove that his case is better than the least vile scenario yet encountered, Petitioner meets even that standard. Focusing solely on the few fact patterns which deviate from the pattern of extraordinary brutality typical of vileness cases, Petitioner's crime still does not compare with those in other death penalty cases. *See Barnes v. Commonwealth*, 234 Va. 130, 360 S.E.2d 196 (1987) (defendant shot 73-year-old victim twice, then shot another victim point blank, killing him, before returning to shoot first victim in neck; reviewing court relied upon Petitioner's case to state that defendant's actions were more vile than the minimum standard), *cert. denied*, 484 U.S. 1036 (1988); *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985) (defendant shot one victim twice, then later leaned over counter to fire two more shots into victim's body, *cert. denied*, 475 U.S. 1099 (1986); a week later, defendant repeated crime with another victim, firing twice and then returning to shoot victim twice more); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979) (willful, deliberate and premeditated murder for hire with elaborate planning in which defendant ate and drank while waiting for victim to arrive, thereafter shot victim five times with hollow bullets, took food from victim's home, and hosted party to celebrate that "[t]he beast is deceased"), *cert. denied*, 444 U.S. 1049 (1980).[20]

Commonwealth, 219 Va. 1091, 254 S.E.2d 116, *cert. denied*, 444 U.S. 919 (1979) (defendant raped 71-year-old woman, struck her several times in head and body with an ax, shoved ax handle into her rectum, drove a nail into her wrist, and set her on fire while still alive).

[20] The only other case which the Virginia Supreme Court cited as comparable to Petitioner's did not indicate that the jury

Because Petitioner's case is clearly distinguishable from the core of vileness cases, because his crime is less brutal than even the least vile cases in which the death penalty has been imposed in Virginia, and because the fact pattern in this case is considerably less violent than those present in many cases in which defendants received life sentences, subjecting Petitioner to the death penalty can only be described as arbitrary. Because there is no meaningful basis for justifying the imposition of capital punishment in this case, the sentence is unconstitutional.

* * *

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relied on the vileness factor for its recommendation of capital punishment. *See Briley v. Commonwealth*, 221 Va. 532, 273 S.E.2d 48 (1980), *cert. denied*, 451 U.S. 1031 (1981). Because the record is unclear and at best might support an argument that both future dangerousness and vileness figured in the jury's verdict, the case is inapposite to Petitioner's, in which the jury relied solely on vileness.

No. 94-1238

(4)

In The Supreme Court of the United States

OCTOBER TERM, 1994

WILLIE LLOYD TURNER,
Petitioner,

v.

JOHN JABE, Warden,
Greenville Correctional Center,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases:	Page
Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988)	5
Barber v. Tennessee, No. 94-7254, 1995 WL 67506 (U.S. Feb. 21, 1995)	2
Godfrey v. Georgia, 446 U.S. 420 (1980)	2, 4
Perry v. Lynaugh, 492 U.S. 302 (1989)	2
Strickland v. Washington, 466 U.S. 668 (1984)	5
Stringer v. Black, 112 S. Ct. 1130 (1992)	2
Teague v. Lane, 489 U.S. 288 (1989)	1, 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1238

WILLIE LLOYD TURNER,

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v.

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Greenville Correctional Center,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

In an effort to deflect the Court from considering the constitutional infirmities of Virginia's vileness aggravating factor, the Brief In Opposition To Petition For A Writ Of Certiorari (the "Opposition Brief") presents two questions for consideration beyond those presented in the Petition. The Opposition Brief first argues, without basis, that Petitioner's questions presented are barred under the "new rule doctrine" from *Teague v. Lane*, 489 U.S. 288 (1989). The Opposition Brief then asserts that Petitioner has procedurally defaulted on his claims. After detailed consideration, the Court of Appeals correctly rejected both of these arguments in the opinion below. (Pet. App. 7a-36a.) To the extent the Commonwealth now seeks reversal of those rulings, it should have filed a cross-petition seeking review from this Court. To the extent

the Opposition Brief is not a cross-petition for certiorari review (see Supreme Court Rule 12.3), the Court of Appeals opinion stands, and the "new rule doctrine" and procedural default issues are not properly before this Court.

1. In any event, the Commonwealth's *Teague* argument is nothing more than a circular contention that any issue that might be worthy of this Court's consideration is necessarily a "new" issue that cannot be pursued in habeas proceedings. Yet *Stringer v. Black*, 112 S. Ct. 1130, 1135-36 (1992), held that there is no new rule for *Teague* purposes when a court applies constitutional principles from *Godfrey v. Georgia*, 446 U.S. 420 (1980), to another death penalty scheme. That is precisely what Petitioner asks this Court to do. Nor is there any substance to the Commonwealth's claim that granting relief here would upset prior rulings of the Fourth Circuit, thus creating a new rule. In *Perry v. Lynaugh*, 492 U.S. 302, 314-15, 318-19 (1989), this Court squarely rejected a similar argument, holding that the petitioner did not seek a new rule simply because he sought the application of a preexisting rule to a new setting, even if the court of appeals had previously reached another conclusion. The fact that this Court has previously declined opportunities to review Virginia's vileness aggravating factor in other cases does not support the Commonwealth's argument against this Petition. Denial of a writ of certiorari is entitled to no precedential weight on the merits of the questions presented. *See, e.g., Barber v. Tennessee*, No. 94-7254, 1995 WL 67506 (U.S. Feb. 21, 1995) (Stevens, J.) (clarifying that denial of certiorari has no precedential effect and does not mean constitutional challenge to aggravating factor lacks merit). Furthermore, all of the other denials of certiorari cited in the Opposition Brief are cases in which juries found both vileness and future dangerousness, i.e., both aggravating factors available under the Virginia statutory scheme. In all of those cases, the Commonwealth argued that this Court need not reach

the merits of the vileness factor because in a non-weighing state the death penalty can be sustained on one aggravator —there future dangerousness—alone. Because this Petition involves *only* vileness, it presents the best opportunity to date for this Court to address the constitutional problems inherent in that factor.

There is also no basis for the Commonwealth's contention that Petitioner's claims have been procedurally defaulted. The Court of Appeals addressed this argument at length and indicated, in painstaking detail, how the questions presented have been preserved on direct appeal and in each habeas proceeding. (Pet. App. 27a-36a.) The Opposition Brief does not challenge the law applied by the court, but merely challenges the factual details. Notwithstanding any difference of opinion on the facts, the Commonwealth's deliberate or inadvertent failure to comprehend the scope of Petitioner's arguments at each of the prior proceedings does not constitute procedural default.

2. In claiming that the Petition does not raise constitutional issues, the Opposition Brief misstates the law and misperceives the questions presented in the Petition. The Petition does not contest that States are free to choose their own aggravating factors or that States may narrow the imposition of the death penalty during the guilt phase of capital murder. That does not suggest, however, that States may not employ a two-step process using broad factors during the guilt phase and then narrower factors during the penalty phase; indeed, many States have adopted such a scheme. Insofar as the Virginia General Assembly has chosen to require aggravating factors in sentencing and has limited them to vileness and future dangerousness, the fact that other States have adopted different approaches to aggravating circumstances has no probative weight here.

Furthermore, even if Virginia's predicates for capital murder were deemed to be aggravating circumstances for

purposes of Eighth Amendment narrowing, the vileness and future dangerousness aggravating factors in sentencing are still subject to constitutional requirements. In Virginia, a sentencing jury must find that a statutory aggravating factor is present before fixing the death sentence; this creates a due process obligation that the factor not be arbitrary or vague. In this very case, this Court affirmed Petitioner's conviction but remanded the case for resentencing. Surely the Eighth and Fourteenth Amendments require that the subsequent resentencing ordered by this Court not be arbitrary or capricious. The resentencing jury, however, had only the jury instructions elaborated in the Petition, and those instructions did not provide adequate guidance to avoid the arbitrary infliction of capital punishment.

3. *Godfrey v. Georgia*, 446 U.S. 420 (1980), struck down as unconstitutional a statutory provision identical to the one used in Virginia. The Virginia courts have consistently demonstrated a fundamental disregard for that opinion. The Opposition Brief goes even further, first arguing that constitutional review of Virginia's aggravating factors is unnecessary and irrelevant, and then dismissing the constitutional problems in the Virginia scheme summarily. In doing so, the Opposition Brief only underscores the inadequacy of a scheme that allows juries to sentence defendants to death if they find the presence of "moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."

Although the Opposition Brief cites several Fourth Circuit opinions for the proposition that the vileness aggravating factor passes constitutional muster, it does not address Petitioner's point that the Court of Appeals has never articulated a common-sense meaning for the depravity of mind instruction. Indeed, the Commonwealth's arguments that the Virginia Supreme Court and Fourth Circuit have repeatedly endorsed the Virginia scheme are simply one more indication that certiorari review is nec-

essary to resolve the problem. The patent lack of concern in the Opposition Brief for the scheme's constitutional problems testifies strongly to the importance of action by this Court.

The Opposition Brief does not offer a common-sense meaning for the depravity of mind jury instruction or explain how that instruction narrows the imposition of the death penalty. It does not even attempt to reconcile the opinion below with the conflicting holdings in other circuits on both the jury instructions and the appellate review necessary to save the aggravating factor. In short, it does not contest any of the reasons for granting certiorari review on this question.

4. With regard to the question of ineffective assistance of counsel, the Opposition Brief does not refute the Petition's showing that courts have disagreed often and with increasing frequency on the *per se* rule. Then-Judge Breyer's dissent in *Anderson v. Butler* recognized the tensions between those rulings and the *Strickland* test. This case offers the Court an excellent opportunity to resolve the issue.

CONCLUSION

For the foregoing reasons, and for the reasons set forth previously, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: March 3, 1995

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